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Brief of Garber IN THE Ely Case.

Supreme Court of the United States.

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Appellants,

vs.

THE SAN DIEGO LAND AND TOWN COMPANY OF MAINE.

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Brief of John Garber and Frank H. Short,

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It appears from the record in this case, from the briefs filed in the lower Court and from the opinion of the lower Court, as reported in Volume 76 of the Federal Reporter, at page 319, that one of the questions in

controversy between the contending parties is the question whether, under the Constitution and laws of California, a water company, engaged in the business of supplying water to the general public, for irrigation, can enter into a valid and binding contract with a consumer, fixing a specific price or rental for water to be furnished him by the company, for use in the irrigation of his lands.

Inasmuch as this question is of great importance both to irrigation companies and to consumers, we have asked the privilege of presenting to this Court an argument in favor of the proposition that there is nothing in the Constitution of California, nor in any of the statutes of that State, nor in the general law governing the method of conducting a business charged with a public use and involving the exercise of a franchise, which is at all inconsistent with the validity, legality and binding force of a contract of the kind above referred to. This position is at variance with the views expressed in the opinion of the lower Court (76 Fed. 319); but we hope to be able to show that it is correct, upon principle and authority, and moreover, that contracts of the kind in question have been repeatedly and uniformly recognized and enforced by the Supreme Court of California.

It would seem to be doubtful whether such portions of the opinion of the Circuit Court as relate to the question whether a valid contract fixing the price of water is possible, under the California law, are not

obiter; since there is evidently a question as to whether the record discloses any such a contract; but in the event that this Court should conclude that the question as to the validity of water rate contracts is really in issue in this case, we beg leave to submit the following statement of the reasons and authorities upon which we rely as establishing the validity of such agreements.

The Supreme Court of California has always upheld and enforced contracts between irrigation companies and consumers fixing the rate of compensation for furnishing water.

In *Fresno Canal & Irrigation Co.* vs. *Dunbar*, 80 Cal. 530, the judgment of the lower Court was affirmed. That judgment foreclosed the lien of a contract between the irrigation company and the owner of the land upon which the lien was foreclosed. By the terms of the contract the irrigation company agreed to furnish to the landowner or his successors in interest, for a term of years, all the water that might be required for the irrigation of a tract of land, specifically described, not exceeding a specified quantity. The right to this water was to be appurtenant to the land and pass with it. The landowner on his part agreed to pay a stated sum of money at once, and in addition to this an annual payment of a stated sum, and it was further agreed that the covenants contained in the contract should run with and bind the land.

In *Fresno Canal & I. Co.* vs. *Rowell*, 80 Cal. 114,

the Supreme Court held that a similar contract created a lien on the land which could be enforced by foreclosure against the land and every grantee thereof who is not a *bona fide* purchaser without notice.

In *Clyne* vs. *Benicia Water Co.*, 100 Cal. 310, a judgment decreeing specific performance of one of these water right contracts, was affirmed.

If it be asserted that in these cases no point was made as to whether these contracts were in violation of any constitutional or statutory provision regarding the sale, rental or distribution of water, we reply that the judgment of the Court necessarily implied the validity and enforcibility of the contracts, and since the record in each of these cases showed all the facts necessary to inform the Court of the nature of the contract in relation to the constitutional and statutory provisions above referred to it must be presumed that the Court considered the question of whether the contracts were in contravention of the Constitution. As was said by the Court in *City of Los Angeles* vs. *Pomeroy*, 124 Cal., at p. 641, in reference to the question of whether the pueblo of Los Angeles was extinguished, or its rights to the waters impaired by the abolition of the ayuntamiento,

> "This question, however, ought to be considered closed by the previous decisions of this Court in the *Vernon Irrigation Company's* case, and others. All of the laws and public documents upon which its solution depends are within the judicial cognizance of the Courts, and whether they were actually

noticed or not in the previous decisions, they must be deemed to have been considered and allowed their due weight."

And see as also illustrating the applicability of the doctrine of *stare decisis;* and showing that this is pre-eminently a case where the previous adjudications and rulings should be firmly adhered to.

Sacramento Bank vs. *Alcorn*, 53 Pacific, p. 814.

Water right contracts have been recognized and treated as valid in

San Diego Flume Co. vs. *Chase*, 87 Cal. 561;
Balfour vs. *Fresno Canal & I. Co.*, 109 Cal. 221.

Fairbanks vs. *Rollins*, 54 Pac. Rep. 79, is a case where the Supreme Court of California rendered a decision which necessarily involved the determination of the question as to whether a water right contract can be valid and binding under the constitution and laws of California. And not only was this question involved by necessary implication from the nature of the judgment, but it appears from the record in that case that the contract was expressly attacked on the ground that it was contrary to the constitution and statutory law of California. Although in the opinion of the Court this objection was not specifically discussed, it is evident that it was not overlooked.

The facts in this case were as follows: The plaintiff sued upon a promissory note which was, by its terms, payable upon the tender by plaintiff to defendant, the maker of the note, of a good and sufficient water right

for the irrigation of a parcel of land containing 4.22 acres, the same to be sufficient to furnish water to the amount of at least 1-7 of an inch to each acre in said parcel of land. Plaintiff tendered defendant 5 water certificates of a certain water company, a corporation, together with a tender of a right of way through a certain pipe line reaching his land, for the conveyance of the water represented by said water certificates. By these certificates, the corporation in terms guaranteed to the holder thereof a flow of water to every acre of land, to which the water was to be devoted. The defendant refused to pay the agreed amount and placed his refusal on the ground that the certificates tendered were worthless and could not vest in or transfer to the holder any water or water right whatever. One of the grounds upon which this contention was rested, as appears both from the brief of the plaintiff and that of the defendant, was that the constitution and statutes and public policy of the State of California did not admit of the transfer of the water right or the making of a contract fixing the amount of compensation for the water right. This point was distinctly raised in the appellants' brief and was fully replied to in the respondent's brief. The respondent carefully considered the question whether water is the subject of private ownership under the constitution and laws of California, and also discussed at length the question whether the existence of a legislative power to regulate water rights precluded the sale of water rights, and the determination by means of a contract of the price thereof.

An examination of the respondent's brief, in *Fairbanks* vs. *Rollins*, shows that the point made by the respondent's attorneys was merely that, even though it should be admitted that the Legislature had the power to regulate the charges of water, and that, therefore, a water right would be taken subject to this power of regulation, nevertheless the water right, even though thus subject to regulation, would still constitute property and be a valid consideration for the promise to pay for it. The opinion (reported in 54 Pacific Reporter) shows that the Court considered the question whether the water certificates were valid and constituted a good consideration for the note. The Court expressly said that

> "it was further averred in the answer that the said certificates constitute no water right, and they do not and cannot vest in or transfer to the holder thereof any water or water right whatever and that they are of no value."

After such a question as this had been presented to and noticed by the Court, it certainly cannot be that the Court meant to pass over the question whether these certificates constituted a water right. The record contained a finding to the effect that the tender made by the plaintiff was an offer to convey the water right in accordance with the terms of the contract, and that the certificates entitled the holder to the water described on the face of the same, and were of the value of $500, at least, and that such certificates convey and transfer the water and water rights represented on their face,

If the proposition advanced by the counsel for appellant in *Fairbanks* vs. *Rollins* as to the invalidity of a water right contract had been well taken, the finding above referred to would have been erroneous, as a matter of law; for the legal proposition relied on by the appellants was absolutely inconsistent with the finding that the certificates conveyed and transferred the water and water rights represented on their face, and entitled the holder to water described on the face of the same. If the position of the appellant was correct, the certificates tendered could not have been a good consideration for the note, because they could have transferred no right or title to the water or its use. This is apparent on the face of the findings in *Fairbanks* vs. *Rollins*. For these findings are that the certificates tendered were certificates of a water company, and if the position taken, by the appellants, that the water company could not transfer title to a water right, was correct, it would follow that the certificates which were tendered to the defendant could transfer no rights to the water, and would therefore be worthless. Hence, the affirmance of the judgment by the Supreme Court in the face of the findings and of the points expressly made in the briefs, amounted to an overruling of the contention that a water right contract is repugnant to the Constitution and laws of the State of California.

In view of these authorities, it is submitted that the law of California has been interpreted by the Supreme Court of that State as sanctioning the making of con-

tracts which fix the rate of compensation for furnishing water.

This is the view taken of this matter by the Circuit Court of Appeals in the recent case of *San Diego Flume Co.* vs. *Souther*, 90 Fed. 164. In that case the Circuit Court of Appeals, in reversing the decree of the Circuit Court, decided that, prior to the establishment of water rates by public authority in pursuance of the Act of the California Legislature of March 12th, 1885, the matter can be adjusted by contract. The Court thus states its view of the contractural powers of water companies under the Constitution and laws of California, as interpreted by the Supreme Court of that State:

> "In the cases of *Irrigation Co.* vs. *Rowell*, 80 Cal. 114; *Irrigation Co.* vs. *Dunbar*, 80 Cal. 530; *Flume Co.* vs. *Chase*, 87 Cal. 561; and *Clyne* vs. *Water Co.*, 100 Cal. 310, the Supreme Court of California has recognized the validity of contracts between water companies and consumers. It is urged, however, against the binding force of these decisions, that in none of them was the question of validity of contracts such as that involved in this case expressly raised, considered or decided. * * * It is not to be presumed that in rendering these decisions the Supreme Court of California was unmindful of the questions which are expressly raised in the present litigation. 'We are bound to presume that when the question arose in the State Court it was thoroughly considered by that tribunal, that the decision rendered embodied its deliberate judgment thereon.' *Cross* vs. *Allen*, 141 U. S. 528–539."

The Court further says that the trend and purport of

the decisions of the Supreme Court of the State of California are to the effect that notwithstanding the fact that the Constitution declares that the use of waters of the State appropriated for irrigating purposes is a public use, and the further fact that under the law of 1885, upon the petition of 25 consumers, the Commissioners of the county may fix the rates to be charged by the company and paid by the consumer, nevertheless, until such rates are fixed in pursuance of law, the corporation furnishing the water and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreements will be sustained in the Courts.

The Supreme Court of California having thus recognized and enforced contracts fixing water rates, it is submitted that the Federal Courts, including the Supreme Court of the United States, should follow those decisions. The interpretation placed by the Supreme Court of a State upon the Constitution and laws of that State should be adopted and followed by this Court.

It is to be presumed that other contracts have been made, and that money has been invested, in reliance upon the stability of the decisions above referred to.

> " It does not need that manifestly a decision, or a series of decisions, should have actually become a rule of property, or have entered into vested rights, in order to secure for it an immunity from ready changes. If it is to be reasonably presumed that it may have done so, or if it is merely prob-

able that it has done so, the courts will hesitate to disturb it."

Wells—Res. Adjudicata and Stare Decisis, Sec. 601.

We submit that the decisions which have recognized the validity of water right contracts should not be disturbed; for to change the rule which has for years been acquiesced in by both irrigation companies and by consumers, would have the effect of depriving the irrigation companies of the income which by these contracts is secured to them, and of taking from the land owners rights which have attached to their lands, and for which they have paid out large sums of money. The real users of water in California are quite well satisfied with their rights under existing contracts. And if the contracts were adjudged void and the large non-using land owners exempted from their contracts the real irrigators would be the principal sufferers ultimately under rates fixed by boards of supervisors.

There is nothing in the constitution or the statutes or the public policy of the State of California which is in the least inconsistent with the validity and binding force of contracts fixing the amount of the water supplier's compensation.

Those who attack contracts of the kind above-mentioned contend that an individual or corporation engaged in the business of supplying water to the public, for irrigation or other purposes, cannot make bind-

ing contracts with the parties whom it supplies with water; that the determination of the amount of compensation for which, and the terms and conditions upon which, the water is to be supplied is a matter wholly beyond and outside of the domain of contract; a matter which can be regulated only by the action of some official or body authorized by law to establish the rates and terms upon which water shall be supplied to consumers.

This theory, we contend, is manifestly unsound and entirely unwarranted by any provisions of the constitution or the statutes of California, and is based upon an erroneous and distorted conception of the purpose of the constitutional and statutory provisions relating to the sale, rental and distribution of water in that State.

One of the propositions relied upon as supporting the theory that no contract relating to the rates and terms upon which an irrigation company will furnish water to consumers can be valid, is that water appropriated for sale, rental and distribution does not belong to the party so dealing with it; that there can be no ownership of water by an irrigation company, but that all such companies act merely as the agents of the public, in the work of distributing property which belongs to the public.

In support of this point it is sometimes urged that there can be no property in the corpus of water, the only property possible being a right to its use.

But these considerations can throw no light whatever upon the question of the validity or invalidity of a contract of the kind we are now discussing. If it be true that there can be no ownership of the corpus of water and that the only property in water is a right is its use, this applies to the rights of all proprietors of water, whether they be parties who have devoted their property to a public use, or parties who have reserved their water for their own consumption, and whether they are riparian proprietors or appropriators.

Yet no one will attempt to deny that both a private riparian proprietor and a private appropriator—proprietors who use the water for their own consumption, and do not offer it to the public for sale, rental or distribution—have an unquestionable right to sell, transfer, lease or otherwise dispose of the property on whatever terms they can agree upon with other parties. The case of *McFadden* vs. *Board of Supervisors*, 74 Cal. 571, settles this question, and clearly defines the difference in this connection, between the property rights, in water, of one who devotes his water to a private use, and the rights of one who appropriates his water to a public use.

The usufructuary character of property in water is not the characteristic which renders the water of an irrigation company subject to a public use and to regulation by the state. While on the one hand it is true that an owner who has but a usufructuary right in his property, may

nevertheless retain his power to contract with reference to that property, untrammeled by state regulation, on the other hand, one who owns the corpus of his property may be subject to such regulation on the ground that the property has been devoted to a public use.

Thus, even were it admitted that no one can have anything more than a usufructuary property in water, the question as to the extent to which the holder of this usufructuary property is free to sell and transfer the same, and to make contracts concerning it, would still remain unanswered. It follows that the contention that an irrigation company has no power to make binding contracts concerning the sale and rental of the water supplied by it to its consumers cannot be sustained unless there is some legal limitation upon him other than the lack of ownership of the corpus.

But of course it is contended that such a limitation does exist; and that this limitation is imposed by the general law respecting public uses; and also by explicit provisions found in the constitution of California, and by certain statutory enactments made in pursuance of these provisions. The constitutional provisions relied on are contained in sections 1 and 2 of article XIV of the constitution, and the statutes are the Act of March 26th, 1880 (Stats. of Cal. 1880, p. 59), and the act of March 12, 1885, (Stats. of Cal. 1885, p. 95).

The constitutional provisions read as follows:

ARTICLE XIV.

Section 1.—The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for public use.

Section 2.—The right to collect rates or compensation for the use of watter supplied to any county, city and county or town, or the inhabitants thereof, is a franchise and cannot be

exercised except by authority of and in the manner prescribed by law.

It is submitted that there is nothing in the general law respecting property subject to a public use, nor in the foregoing extracts from the constitution, which can militate against the right of an irrigation company to make a contract of the kind now under discussion. The statutes of 1880 and 1885 we will consider later on. But now, taking the constitution itself, and viewing its provisions in the light of, and in connection with, the general law governing property charged with a public use, we assert that nothing will appear which does not harmonize with such contracts.

What was the object of these constitutional provisions concerning the use, sale, rental and distribution of water? We answer that it was simply and solely to establish clearly and in such manner that it could never be ignored by the legislature, the principle that the business of supplying the public with water is within the scope of the rule announced by the Supreme Court of the United States in the leading case of *Munn* vs. *Illinois*; the rule that when private property is devoted to a public use, it is subject to public regulation; that where a business is clothed with a public interest, it is subject to legislative control and direction as to the manner in which, and the terms upon which, it may be carried on. The language of the constitution is fully accounted for without ascribing to the framers of that instrument an intention to do more

than effectuate the purpose above indicated. The dissenting opinion in *Munn* vs. *Illinois* shows that the Court experienced difficulty in determining under what circumstances property becomes affected with a public use. This is pointed out by Mr. Justice Field in delivering the opinion of the Court in *Georgia Railroad Co.* vs. *Smith*, 128 U. S. 174, 9 S. Ct. 47, 49. He there says that

> " there have been differences of opinion among the judges of this Court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected (i. e. affected with a public use) "as in *Munn* vs. *Illinois*."

In his dissenting opinion in *Munn* vs. *Illinois*, Mr. Justice Field took the position that property or business can be affected with a public use, so as to be subject to legislative regulation, only in cases where some special privilege or franchise has been conferred by the government upon the proprietors of the property or business in question. In this view he was at variance with the majority of the Court, who held that, apart from any question of the exercise of a franchise or special privilege, a business might be of such great importance to the general public, and so much in the nature of a practical monopoly, as to be affected with a public use. In view of these differences of opinion among the justices of the Supreme Court, there was good reason for placing in the constitution an express provision to the effect that the business of supplying the public with water is a franchise; and in view of the

acknowledged difficulty of determining whether a given business is of sufficient importance or sufficiently in the nature of a monopoly to be clothed with a public use, it was only natural that the framers of the constitution should, by an express declaration, include the business of supplying the public with water within the class of industries affected with a public use. Moreover, as pointed out by Judge Ross in *People* vs. *Stephens*, 62 Cal. 233, the framers of the constitution intended to take away from the legislature the power, formerly residing in that body, to say whether the sale, rental and distribution of water should be a public use. All of the provisions relating to water found in the Constitution of California, are thus fully accounted for on the hypothesis that the purpose of the convention was merely to securely place the business of selling, renting and distributing water to the general public in the same category with the business of operating a railroad, or a canal, or a ferry, or a grain elevator, or any other enterprise which, because of its peculiar nature, is clothed with a pulic use.

The debates in the constitutional convention contain passages which lead to the same conclusion.

In discussing these provisions during the discussion of the first section of Article XIV (which was introduced as amendment to the report of the committee by Mr. Hale), Mr. Howard said:

"The amendment of the gentleman from Placer

(Judge Hale) covers the whole question as far as it goes; and that is that when water is appropriated for sale or rental, that becomes a public use, as decided in the elevator case."

Debates of the Constitutional Convention, Vol. 2, page 1022.

Mr. Shafter said (see page 1021):

"I suppose the convention will apply the principle of the elevator case to this provision; and that is the common sense view to take of it."

There is nothing in the phraseology of the first and second sections of Article XIV which calls for a construction different from that above suggested. We need not dwell, at this point, upon the provisions in section one relative to the method of fixing water rates in municipalities, since, as we shall hereafter more particularly point out, these specific provisions have no application to localities outside of cities and towns. As to the other provisions of section one and the provisions contained in section two, it is submitted that, properly construed, they amount to no more than this -that the business of supplying water to the general public is clothed with a public use, and subject to legislative control, and that the right to collect compensation for this service is a franchise, which cannot be exercised as a matter of common right, but only as a special privilege granted by the State; and that the manner in which such a privilege can be exercised may be prescribed by the power which grants it; and that it can be exercised only in conformity to such regulations and restrictions as that power may impose.

A construction which converts the provisions in question into an inhibition of any transaction of business by a water company except in pursuance of specific directions from some official source, is, we submit, strained and fanciful. Assailants of water rate contracts take the position that the concluding portion of section two is equivalent to a declaration that the privilege of collecting water rates cannot be exercised at all, unless some official regulation has been made, prescribing the terms and conditions upon which compensation for the furnishing of water may be collected, and designating the amount of such compensation. We insist, on the contrary, that all that is meant by this concluding portion of section two is that the franchise in question shall not be exercised in any manner inconsistent with such regulations as may have been legally imposed.

The purpose and meaning of sections one and two of Article XIV being such as we have stated, it follows that there is nothing in these provisions at all incompatible with the existence of property rights on the part of an irrigation company, in the water which it supplies to the public, or with the power of such a corporation to enter into contracts with its customers concerning the terms upon which the water shall be furnished.

Property affected with a public use may still continue to be private property, although stripped of some of the incidents of absolute ownership. The property

rights of one whose property is devoted to a public use are, of course, curtailed and restricted by reason of the existence of this use. But there is an obvious distinction between the restriction of the scope of a property right and its obliteration. Thus, although the property used by a railroad company in the operation of its road is clothed with a public use, and though the operation of the road is a franchise and, as such, subject to State regulation, the ownership of the property is nevertheless private.

Olcott vs. *Supervisors*, 16 Wall. 678.

In the opinion of the Court in that case we find the following statement:

> "Whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function is that of the State. Though the ownership is private the use is public."

In *Inhabitants of Worcester* vs. *Railroad*, 4 Met. 564, the Court says (p. 566):

> "It is true that the real and personal property necessary to the establishment and management of the railroad is vested in the corporation; but it is in trust for the public."

In *Welsh* vs. *County of Plumas*, 80 Cal. 341, it is held that the right of way owned by the keeper of a toll road is private property, though for public use.

The recognition of private ownership in property

clothed with a public use is apparent throughout the opinion of the Court in *Munn* vs. *Illinois*, 94 U. S. 113.

In *San Diego Co.* vs. *San Diego*, 118 Cal. 556, the Court says (p. 570) that the public may be said to be the real owner of the water and distributing works of a water company; but there is no distinction made between the water and the pipes, reservoirs and other property used in the distribution of the water. This shows that the Court regarded the qualified character of the ownership of water by a water company as due, not to anything peculiar to water, as distinguished from other kinds of property, but as due solely to the fact that the company had devoted the water to a public use.

We take it that no more was meant than that the ownership of property clothed with a public use is qualified and limited; that the owner holds it subject to certain obligations and trusts in favor of the public. This idea is more clearly expressed in another portion of the same opinion (p. 567), where the language of the Court is

> "That the water company does not own the water which it collects and supplies, or the plant which it uses to collect and distribute that water in the same sense that a man is said to own his house or his farm."

It is true that in the opinion (118 Cal. 570) it is intimated that, by regulating the rates which a water company may charge, the state virtually takes the water and the distributing plant, and that the company

no longer remains the real owner. But it is to be noted that this is not confined to the water, but embraces the distributing plant as well. Necessarily, then, what is said as to the loss of ownership would apply to the case of any owner of property, the rates for the use of which are fixed by public authority. It would apply to a railroad company as fully as to a water company, and hence the opinion of the Court might seem to uphold the theory that even a railroad company is not the real owner of its property, when the State, by regulating fares and freight rates, has virtually taken the property. But the decisions of the Supreme Court of the United States in which is advanced the doctrine that the regulation of rates may amount to a taking of the property for whose use the rates are charged, do not countenance the idea that a regulation of rates is equivalent to an absolute taking of the property. At most they treat such regulation as a taking of the use, or a portion thereof, the title remaining where it was.

Regan vs. *Farmers' L. & T. Co.*, 154 U. S. 362; 14 Sup. Ct. 1047, 1059.

See also *Ames* vs. *Union Pac. R. R. Co.*, 64 Fed. 165, where the Court, in distinguishing between a reduction of rates and an absolute taking of the property, points out that in the former case the owners must continue to own the property.

It must be a mistake, then, to assume that the regulation of the use of property can, of itself, transfer

the ownership to the public. A *fortiori*, the mere existence of a power to regulate—the mere fact that the property is affected with a public interest, and is therefore subject to legislative control—cannot constitute the public the real owner of the property.

Indeed this last proposition is a corollary of the proposition that a reduction of rates may amount to a taking of property; for prior to the regulation of rates the property must remain in the private owner, since otherwise there would be no property for the public to take.

That a water company retains the ownership of the property which it has appropriated to the service of the public, and cannot be deprived of this property without just compensation, is decided by this Court in the recent case of *San Diego L. & T. Co.* vs. *National City*, 19 Sup. Ct. 804.

Any fancied distinction, with respect to property rights, between a water company and a railroad company, or any other proprietor of property clothed with a public use, is dispelled by the opinion in this case. All of these enterprises are placed on the same footing and the same constitutional guarantee is held to cover them all. On page 810 the Court says:

> "That it was competent for the State of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use, and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix the rates of compensation

to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily, and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use ; for the State cannot by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law."

We have discussed this question of the ownership of water at some length because of the contention frequently made that a party who supplies water to the public cannot be the proprietor of the water, and therefore cannot be in a position to sell a water right. We do not consider the question of proprietorship material, since we hold that, even on the theory that a public carrier of water is no more than the mere agent of the State, it nevertheless is authorized to sell water and water rights to its customers. Still, we maintain that the position that there can be no ownership of water in the State of California is wholly untenable. Some confusion has resulted from a failure to distinguish between the provisions of the constitution of California, and those of the constitution of Colorado, relating to water and water rights. The provision of the Colorado constitution to which we have just referred reads as follows :

" The water of every natural stream not heretofore appropriated within the State of Colorado is

> hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

Section 5. Art. XVI.

No such provision can be found in the constitution of California. A similar provision was offered but rejected. The constitution of Idaho is, in so far as this matter is concerned, practically the same as that of California; and therefore the distinction laid down by the Supreme Court of Idaho between the constitution of Idaho and that of Colorado is directly in point here.

In *Wilterding* vs. *Green*, 45 Pac. 134, we find a judicial comparison of the two constitutions. The Court said, p. 137:

> "Compare section 5 of article XVI of the constitution of Colorado with section 1 of article 15 of the Idaho constitution, which is as follows: 'The use of all waters now appropriated or that may hereafter be appropriated for sale, rental or distribution, also of all water originally appropriated for private use, but which after such appropriation has heretofore been or may hereafter be sold, rented or distributed, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law.' The distinction between the two provissions, it seems to me, is too palpable to require elucidation or warrant discussion. The Colorado constitutional provision recognizes the previous existence of private property rights in the water of natural streams, but prohibits the acquisition of such rights in the future. The Idaho

> constitution does not pretend or assume to control or interfere with private property rights in such waters, but declares the use of all such waters, whether theretofore or thereafter appropriated, a public use, and under the control of the State. The doctrine of the Colorado Court, that the canal or ditch owner is a mere 'common carrier', could not, certainly, be predicated upon the provisions of the Idaho constitution. * * * * The sale, renting and distributing of the water is a dedication, and brings its use under the control of the State, but it in no sense destroys or abrogates the property rights of the appropriator therein."

The debates of the Constitutional Convention of 1879, disclose not only the absence of any purpose on the part of the framers of the California Constitution, to interfere with the right of ownership of waters acquired by appropriation, but also the presence of a clearly expressed determination to leave such rights unimpaired.

In the course of the discussion of the amendment proposed by Mr. Hale, which was adopted and became part of section 1, Article XIV, Mr. Tinnin said:

> "This committee has not attempted to take away any private or vested rights. It has simply provided that it shall be subject to State control when it is sold or rented. When an individual or a corporation has a water right, they have individual control of it; but when they attempt to rent or sell it, then we declare that it is a public use subject to legislative control."
>
> Vol. 2 Debates, p. 1021.

Mr. Howard spoke as follows:

> "If there is anything settled at all about water—running water—it is that when it is appropriated it becomes private property. The amendment of the gentleman from Placer, Judge Hale, covers the whole question as far as it goes, and that is that when the water is appropriated for sale or rental, that becomes a public use as decided in the elevator cases."

By reference to page 1030, Vol. 2 of the Debates, it will be seen that the following amendment was offered:

> "The only property that can be required in any of the waters of this State by appropriation or condemnation is a use, and such use shall forever remain subject to regulation and control by the Legislature of the State for the use and benefit of all."

In commenting upon this amendment, Mr. Estee said, among other things:

> "Mr. Chairman, I hope the amendment will not be adopted. The whole thing seems to be harmonious as it stands. Now, the gentleman proposes another section declaring that there is no property in water, that wherever parties have acquired a right it shall be but a use. Now that is contrary to the very principles of the rights of property, as far as appropriation is concerned."

The amendment was lost.

Vol. 2 Debates, pp. 1030–1031.

We repeat then that although the water and distributing plant of an irrigation company may be clothed with a public use, and though the carrying on of the business of selling and distributing the water to the public may be a franchise which can be exercised only

by authority of and in the manner prescribed by law, nevertheless the irrigation company is the owner of its water and its plant; that in it is vested the title to this property, although the title is held subject to various obligations to the public. Whether or not the duties which the irrigation company owes to the public are inconsistent with the sale of water rights by the company, we will consider hereafter. But here we make the point that if any such objection to the sale of water rights exists, it must rest upon some ground other than the alleged impossibility of ownership of water appropriated to sale, rental and distribution in the State of California.

But even if one engaged in the business of supplying the public with water be regarded as a mere agent of the State, having no proprietary interest in the water distributed, he might, and we contend would, have authority to confer upon a given consumer a water right in the nature of an easement. By reason of this agency he would be authorized to deal thus with the public property entrusted to his management. This proposition is recognized and accepted by the Supreme Court of Colorado in the case of *People* vs. *Farmer Co.*, 54 Pac. 626.

The power of an irrigation company to make contracts with consumers, as to the terms upon which water shall be furnished, is not taken away by the provisions of Article XIV of the Constitution. A business may be affected with a public interest; may be subject to

regulation and control; and may involve the exercise of a franchise, and still the transaction of this business may remain within the domain of contract. It is erroneous to assume that because a business is subject to public regulation, no binding contracts can be made concerning it. Such a view is unsupported by authority, and is clearly wrong on principle.

In this connection there is no difference between the business of supplying water and the railroad business, or any other enterprise affected with a public use and involving the exercise of a franchise. They all stand in the same relation to the public, and the power to make all reasonable contracts, not inconsistent with regulations legally imposed, remains and resides in them all.

The power of a railroad company to enter into special agreements with its customers as to the compensation for, and terms upon which, freight or passengers will be carried, has often received judicial recognition.

See *Lough* vs. *Outerbridge*, 38 N. E. 292; 143 N. Y. 271.

Kansas Pac. Co. vs. *Bayles*, 35 Pac. 744, 22 Pac. 341;

Thompson vs. *San Antonio Ry. Co.*, 32 S. W. 427;

Hayes vs. *Pennsylvania Co.*, 12 Fed. 309;

Western Co. vs. *Newhall*, 24 Ill. 466.

The same power exists in canal companies.

Del. H. Canal Co. vs. *The Penn. Coal Co.*, 21 Pa. St. 131;

Commonwealth vs. *D. & H. Canal Co.*, 43 Pa. St. 295.

And that the same principle applies to the case of companies engaged in supplying the public with water appears from the following cases:

Wyatt vs. *Irrigation Co.*, 33 Pac. 144 (Colo.).

In this case the Court says in reference to a water right contract (p. 147):

> "The rights of the respective parties are, therefore, to be measured and determined by the construction of the contracts in question; and the controversy, as above stated, involves only their contractual rights. The status of the defendant company could in no respect affect these rights. Its duty to these plaintiffs would be the same whether that duty was to furnish water under their contracts as proprietor or carrier of water."

In *People* vs. *Farmers &c. Co.*, 54 Pac. 626 (Colo.), the binding force of a water right contract is expressly recognized, and it is held that the irrigation company may be compelled, by mandamus, to perform. On page 630 the Court, after citing cases in which a statutory duty to furnish water was enforced by mandamus, proceeds thus:

> "While the right recognized in these cases was one conferred by statute, which the relator, upon the performance of certain conditions precedent, was entitled to enjoy, we are unable to perceive any reason why the same right, when conferred by contract, is not equally susceptible of enforcement in this manner, when clearly established as in this case, and the consequences of its denial are the same."

In connection with these Colorado cases it is to be

noted that the Constitution of Colorado provides that

> "the water of every natural stream not heretofore appropriated within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State."

It further provides that

> "the general assembly shall provide by law boards of commissioners in their respective counties, who shall have power when application is made to them by either party interested, to establish reasonable and maximum rates for the use of water whether furnished by individuals or corporations."

Yet the Supreme Court of Colorado, in the cases above cited, recognized the validity of contracts by which the rate of compensation was determined.

In *Spring Valley Water Works* vs. *Schottler*, 4 S. Ct. 48 (110 U. S. 347) the right of a water company to make contracts with a municipality is recognized by the writer of the majority opinion, who says (p. 52):

> "The corporation was created by the State. All its powers came from the state and none from the city and county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grow out of contracts lawfully made, depend alone on the statute under which it was organized, and such alterations and amendments thereof as may, from time to time, be made by proper authority."

See also *San Diego Co.* vs. *Souther*, 90 Fed. 164, where it is held by the Circuit Court of Appeals, in reversing the decree of the Circuit Court, that, under

the California Constitution, the water supplier's compensation can be fixed by contract, prior to the establishment of rates in the mode prescribed by the statute.

The Court said that there is no provision of the Constitution or laws of California and no principle of public policy which inhibits such contracts, and that the use of the water is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by law in case the parties cannot agree. (90 Fed. p. 170.)

It is proper to add, however, that a rehearing has been granted in this case.

We repeat, then, that there is nothing in the Constitution of California inconsistent with the right of a water company to make binding contracts as to the terms upon which it will furnish water to its consumers. The Constitution itself goes no farther than to make it the duty of an irrigation company to supply water to parties applying for it, upon such terms as the legislature, in the proper exercise of its power of regulation, may impose, or, when no such legislative regulation has occurred, upon reasonable terms. Prior to the making of regulations by the legislature, or by some body or official acting in pursuance of legislative direction, the irrigation company is bound to furnish water upon reasonable terms, and it is for the courts to determine what is reasonable in case of a

controversy between the company and an applicant for water.

Wilterding vs. *Green*, 45 Pac. 134;
Wheeler vs. *Irrigation Co.*, 17 Pac. 487;
See also *C. B. & Q. Ry.* vs. *Cutts*, 94 U. S. 155.

But this duty to furnish water upon reasonable terms does not conflict with the contractual powers of an irrigation company; for although the company cannot insist upon unreasonable terms as a condition precedent to furnishing water, it is nevertheless open to the customer and the company to agree upon any terms that are mutually satisfactory.

This distinction is pointed out in the case of *Rockland Water Co.* vs. *Adams*, 24 Atl. 840.

The case of *Wheeler* vs. *Irrigation Co.* is one of the cases relied on to uphold the assertion that a water rate contract of the kind here in question is repugnant to the rights conferred upon the public by the constitutional declaration that the use of water is a public use. But no such conclusion can properly be drawn from the decision in that case. All that was there decided was that an irrigation company could not refuse to furnish water upon any other conditions except those laid down in a contract whereby the consumer was bound to pay in advance for water to be furnished during a large number of years. It was held that such an exaction was unreasonable, and that the consumer had a right to demand different terms. But it was not even intimated that had the consumer volun-

tarily accepted these terms, the contract would not have been valid and enforcible. This view of the case of *Wheeler* vs. *Irrigation Co.* is adopted by the circuit court of appeals in *San Diego Co.* vs. *Souther*, 90 Fed. 164, 170.

We say that, under the California constitution, there is no restriction upon the power of an irrigation company to enter into whatever contracts its consumers are willing to agree to, there being no legislative regulation standing in the way of the contract in question; and that such contracts will be binding on the parties thereto.

The company may, by virtue of the fact that its business is clothed with a public use, be in duty bound to refrain from making contracts with one consumer which it refuses to enter into with others desiring similar contracts. But this principle cannot be invoked to *overthrow* all contracts, whether discriminating or not.

Subject to the limitations above referred to, the constitution has left it to the legislature to determine whether or not there shall be any restriction of the right of irrigation companies to arrange, by means of contracts with their customers, the terms upon which water is to be supplied. It is not made the imperative duty of the legislature to regulate these matters by positive enactments, but it is left free to refrain from actively interposing, and to allow the business of supplying the public with water to be carried on by

means of contractual arrangements, and the enforcement by the courts of the duty to furnish water on reasonable terms. In leaving the matter to be thus adjusted, it merely refrains from exercising its power of regulation, and by implication declares that the method prescribed by law for carrying on the business of supplying water shall be the method of voluntary arrangements between company and consumer, supplemented by the action of the courts in ascertaining and enforcing reasonable terms in event of failure to agree.

There is, of course, a difference between the case of a company furnishing water to the inhabitants of cities and towns and that of a company engaged in supplying the inhabitants of localities outside of these municipalities. The constitution itself imposes upon the governing bodies of cities and towns the imperative duty of fixing water rates, and declares that no individual or corporation shall collect rates other than those thus officially established. While we contend that this provision does not conflict with the right of a water company to contract with its urban customers, for rates different from the official rate, whenever the customer so desires, we need not dwell upon this here, for the reason that the provision in question does not apply to localities outside of municipalities; and the question as to the validity of water rate contracts arises in the present case in connection with the furnishing of water to such localities.

The fact that the constitution makes this distinction

between urban and rural localities is, to our minds, a conclusive indication of a purpose and design on the part of the framers of the constitution, to leave it entirely in the discretion of the legislature to decide whether any fixing of water rates in rural communities, by legislative or official action, should occur.

The debates of the convention clearly disclose the existence of such a purpose; for, in its original form, Mr. Barbour's amendment to Article XIV made no distinction between urban and rural communities, but made the mandatory provision as to the fixing of rates applicable to cities, towns and counties alike. After a discussion, in which the fact that the amendment applied to counties was commented upon, Mr. Barbour asked to correct his amendment by striking out the word county from section one in several places.

Debates of Convention of 1879, Vol. 3, p. 1372.

It is apparent from the foregoing and the action of the convention in striking out the word "counties", that it was well understood that the mandatory fixing of rates by supervisors for agricultural communities might not only be undesirable but an objectionable interference with them in carrying on their business, and in diverting, distributing and using water.

It is not necessary for the purpose of this case to determine whether it is within the scope of the Legislature's authority to pass an act prohibiting the adjustment by means of contracts, of the conditions upon which the consumer shall receive water from the irrigation com-

pany. It is enough that no such attempt has ever been made; for the mere existence of the power to establish a system under which no contracts could be made cannot of itself be sufficient to render such contracts invalid. Until the power is exercised, and the prohibitory regulation imposed, the way must still remain open for the adjustment of these matters by means of contracts; and all contracts of this kind would to say the least, be binding until the establishment of some regulation prohibitory of such contracts.

We know of no judicial authority to the contrary of this proposition. The nearest approach to the enunciation of a conflicting doctrine which we have noticed is an intimation made by Judge Ross in delivering the opinion of the Circuit Court in the present case (*Lanning* vs. *Osborne*, 76 Fed.) to the effect that the water supplied by a quasi public corporation is not so far private property that valid contracts may be made in respect to the rates at which it should be furnished to the consumer. The opinion proceeds as follows (p. 337):

> "If the company is a private corporation, and the water private property, this would undoubtedly be so; but if the complainant is a public or quasi public corporation, and the water in question is and at all times mentioned has been charged with a public use, it is not true; for nothing can be clearer than that, in respect to such water, rates established in pursuance of law must control, and that no attempt to ignore that control and to establish them by private contract is of any validity."

It is not clear from the language employed to what extent the learned judge intended to go. But it is hardly to be supposed that he meant to express an opinion to the effect that no one engaged in conducting a business clothed with a public use, can, by means of a contract, bind himself to perform services in the course of such business upon terms defined by the contract. If such was the opinion intended to be expressed it is submitted, with all deference, that it is contrary to all precedent and on principle untenable.

We have thus endeavored to show that water rate contracts are not open to any objection due to the constitution of California or to the general rules of law relative to the subject of water; and will now proceed to inquire whether any valid objections exist by reason of any provision of the statutory law of California.

The statute law of California is such as to admit of the existence of valid contracts between a water company and its customers fixing the rate of compensation for furnishing water for irrigation.

In 1880 the Legislature passed an Act by the terms of which the Supervisors of counties were required to fix water rates, during the month of February of each year, and the collection of rates in excess of the maximum designated by the Supervisors was prohibited.

Stats. 1880, p. 59.

This Act is somewhat similar to the Act of 1885 (Stats. 1885, p. 95); but differs from it in several par-

ticulars, and is, we submit, practically, if not entirely, repealed by the latter Act, which was intended to cover the whole subject matter of the earlier Act, and to establish a new and materially different system for the fixing of water rates in localities outside of cities and towns. The Act of 1880 made it the imperative duty of Boards of Supervisors of their own motion to fix water rates every year, but instead of this, the statute of 1885 provides that upon being petitioned by not less than twenty-five inhabitants who are taxpayers of the county, the Supervisors are authorized and required to fix and regulate the maximum rates at which any person, company, association or corporation having or to have appropriated water for sale, rental or distribution, in each of such counties, may and shall sell, rent or distribute the same. The authority of the Board of Supervisors to fix the rates is made dependent upon the filing of the petition. They cannot, as under the Act of 1880, act without being petitioned. The two Acts are clearly conflicting as to this matter, and cannot stand together. After the rates are fixed they cannot be changed for one year, and then *only as in the Act itself provided.*

Sec. 5.

Section 6 contains the provision as to the method of changing rates, which may be done upon a petition of twenty-five inhabitants, or upon petition of a party engaged in supplying water.

Until the rates are established by the Supervisors, as

in the Act provided, the actual rates established and collected by the persons, companies, associations and corporations furnishing water to the inhabitants are to be deemed and accepted as the legally established rates.

Sec. 5.

These provisions are totally inconsistent with the continued existence of the power or the duty of the Supervisors to fix rates in the manner provided for by the Act of 1880.

The Act of 1885 further provides that water shall be furnished to the inhabitants of a county (other than those of a city or town) at rates *not exceeding the established rate fixed and regulated by the Board of Supervisors of such counties, or as fixed and established by the person, company, association or corporation as provided in the Act.*

Sec. 8.

By section 9 a penalty for collecting rates in excess of the established rates is declared; and section 10 makes it the duty of every party engaged in supplying water to the inhabitants of the county (outside of cities and towns) to furnish water at the established rates (whether fixed by the Supervisors or otherwise) upon a demand and tender of the proper sum of money by any inhabitant, and provides a penalty for refusing or neglecting so to furnish water *to the extent of the reasonable ability of the person or company.*

Such is the statute law* asserted to be incompatible

* The Act of 1885 is set out in full in an appendix to this brief. (Infra, p. 79.)

with the validity of water rate contracts by the assailants of such contracts. But no such incompatibility exists.

The theory upon which the lower Court proceeded in the present case appears to be that the rates provided for by the Act of 1885 must be regarded as absolute substitutes for contract rates; that prior to the fixing of rates by the county Supervisors, the supplier of water must establish a schedule rate, and that this schedule rate is exclusive of any special contract rate, whether higher or lower than the schedule rate. Similarly, according to this theory, when the Supervisors have fixed a rate, this is the only legal measure of compensation, and precludes the possibility of a valid special contract rate, whether higher or lower than the rate established by the Supervisors.

It is submitted that such a construction of the Act of 1885 can be made only by ignoring the plain language of the Act, and by reading into the Act a purpose and design which is clearly inconsistent with tnat language, It is evident, we insist, that the Act of 1885 provides merely for the establishment of *maximum* rates, and that it does not attempt to provide for rates which shall be an absolute substitute for contract rates. If this were not true, why should the power conferred upon Boards of Supervisors have been expressly confined to the fixing and regulation of "*maximum* rates" (See section 2. Stats. 1885, p. 95). Again, why should it have been provided that suppliers of water shall sell, rent

and distribute the same "at rates NOT EXCEEDING *the* "*established rates fixed and regulated therefor by the* "*Boards of Supervisors of such counties, or as fixed and* "*established by such person, company, association or* "*corporation as provided in this Act*"? (Sec. 8. Italics ours.)

If the Legislature really intended to provide that suppliers of water shall sell, rent and distribute water at no other rate than that fixed by the Supervisors or established by the supplier as in the Act provided, upon what conveivable hypothesis could the legislators have been induced to adopt the phraseology which they did adopt in framing section eight?

The theory that rates established pursuant to the Act of 1885, must operate as an absolute substitute for contract rates cannot be applied without virtually striking out of the Act the portions to which we have referred and interpolating provisions which the Legislature did not insert, and did not intend to insert.

All rates established in pursuance of the Act of 1885, whether by the Supervisors or by the individual or corporation supplying the water, are merely *maximum* rates. Thus, section 2 expressly limits the authority of the Supervisors to the fixing and regulation of *maximum* rates. Section 5 provides that, until rates have been established by the Supervisors, "the actual rates "established and collected by each of the persons, com- "panies, associations and corporations now furnishing "or that shall hereafter furnish appropriated waters for

" sale, rental or distribution, to the inhabitants of any of " the counties of this State shall be deemed and accepted " as the legally established rates thereof". But it does not follow from this that no special contract rate can be lawful. All that the provision above quoted amounts to is that the rates established and collected by the supplier shall, in the absence of supervisorial rates, constitute the legally established rate. But what is this legally established rate? Is it an absolute substitute for special contract rates, or is it merely a maximum rate? It needs but a glance at section 8 to find the answer to this question in terms so plain that he who runs may read. It is there declared that the supplier shall furnish water at rates *not exceeding* the legally established rates; or—to use the exact language employed—" at rates not exceeding the established " rates fixed and regulated therefor by the Board of " Supervisors of such counties, *or as fixed and estab-* " *lished by such person, company, association or corpora-* " *tion as provided in this Act.*"

The object of the above quoted provision in section 5 is, we submit, no more than to declare that until the Supervisors act, the suppliers may adopt schedule rates, and that when such a schedule rate has been adopted the supplier shall have the right to collect compensation according to that rate, even though the consumer may have had no express understanding with the supplier as to the price of the water. Thus, if a consumer applied for water and received the same and nothing was said as to the price to be paid, the supplier could,

nevertheless, collect the schedule rate. But the existence of this schedule rate is not incompatible with the right of supplier and consumer to fix upon a different rate by express agreement. At most, the schedule rate is a mere maximum, just as is a rate fixed by the Supervisors, the only difference being that the supplier can change the schedule at will, which cannot be done with the other rate. The provision in section 8 that the supplier shall furnish water at rates not exceeding the schedule rate is inserted merely for the purpose of preventing the supplier from discriminating against any customer by exacting from him, against his will or without his express consent, more than it is customary to collect from other customers. The schedule rate being at most a mere maximum, there can be no more reason for concluding that it stands in the way of a special contract for a lower rate than there is for so regarding a maximum rate fixed by the Supervisors.

If this proposition is correct, it is fatal to the theory that the rates provided for by the Act of 1885 are to be treated as substitutes for contract rates; for, according to this theory every contract is illegal, whether it exceeds the official or the schedule maximum or not.

We think that this doctrine is unquestionably erroneous, and entirely out of harmony with the language of the Act, and that it cannot be doubted that a contract calling for a rate lower than that fixed by the Supervisors or established by the supplier in pursuance of the Act of 1885, is lawful and enforcible. The opposite posi-

tion is, we venture to say, unprecedented, and in direct conflict with the authorities, which clearly support the position that parties engaged in a business clothed with a public use, and involving the exercise of a franchise, are free to make agreements for a rate of compensation smaller than that established by or in pursuance of law. The decisions which sustain this proposition do not contain any implication to the effect that contracts for compensation greater than the rate fixed by law or in pursuance of law, may not be valid. But they do expressly adopt the view that contracts for special rates less than the legal maximum are binding and enforcible.

In *Delaware & Hudson Co.* vs. *Penn. Coal Co.*, 21 Pa. St. 131, it is held that though a canal company was forbidden by its act of incorporation, from charging a higher rate of tolls than that specified in the Act, it was not intended to prevent the canal company from charging a less rate. The parties had entered into a contract by which the canal company agreed to allow the coal company to use its canal for transporting coal, for which compensation was to be made by the coal company upon terms specified in the contract. These terms were such as to make it possible that the canal company would receive less than the amount of tolls which it was authorized by its charter to demand; and the canal company sought to have the contract cancelled on the ground that it had no power to bind itself to accept tolls smaller than the legitimate maximum,

and on the further ground that there was no mutuality of obligation. But the Court held that the agreement was binding on both parties, since the coal company was to be treated as having covenanted to pay the agreed rate of toll, and since there was no principle of law in conflict with the power of the canal company to bind itself by contract to take less than the maximum toll. On page 145 we find the following statement:

> "The charter prohibits the company from charging a higher rate than that specified; but it was not intended to prevent the canal company from charging a less rate; on the contrary, the lower the rate of tolls, the better for the advancement of the public interest; and we see nothing to indicate that these corporations stand in need of legislative or judicial action to restrain either from neglecting or disregarding its own interests"

The same contract was passed upon again in *Commonwealth* vs. *Del. & H. Canal Co.*, 43 Penn. St. 295, where it was held that there was nothing in the agreement contrary to law or public policy.

In *Thompson* vs. *San Antonio Ry. Co.*, 32 S. W. 427, it is held that even where a railroad commission has fixed the rates for a railway company, the company may still make valid agreements to transport goods at a lower rate. The plaintiff had entered into a contract with the defendant, the railway company, by which the company agreed upon the maturing of the plaintiff's crop of watermelons, to furnish cars, and transport the crop to designated points at agreed rates. After the plaintiff had raised his crop the defendant refused to carry

out its agreement, and sought to repudiate the contract. The Court disposed of the matter as follows, (p. 427):

> "It is contended by appellee that the contract was void also because it was an agreement to do what appellee was legally required to do, and, by virtue of the effect of the commission act, the contract was without consideration to support it. This position would be entitled to weight if the law was such that a railway could charge for transportation only at some rate previously fixed by the commission, no more and no less. But this is not the statute. The Act, as we understand it, even where rates have been fixed, does not enjoin the railway company from charging a less rate than the commission has named (sections 14 and 15); and therefore, even in cases where the commission has fixed the rates for a railway company, it cannot be said that it is powerless to make contracts for transportation."

The statute to which reference is made in the above quotation is a Texas statute, relating to the regulation of freights and fares and is one of the most strict and severe of its kind.

See *Reagan* vs. *Farmers, etc.*, 154 U. S. 362.

Section 14 reads:

> "If any railroad company subject to this Act, or its agent or officer, shall hereafter charge, collect, demand or receive from any person, company, firm or corporation a greater rate, charge or compensation than that fixed and established by the railroad commission, for the transportation of freight, passengers, or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling or

storing any such freight or for any cars, or other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the State of Texas a sum not less than $100, nor more than $5,000."

Section 15 defines "unjust discrimination" and imposes a penalty of not less than $500, nor more than $5,000, upon any railroad company violating any provision of the section.

Section 17 declares that any railroad company violating the provisions of the Act shall be liable to the persons injured thereby for the damages sustained in consequence of such violation, and in case it is guilty of extortion or discrimination, as defined in the Act, shall pay, in addition to such damages, to the person injured, a penalty of not less than $125, nor more than $500.

The suggestion in the foregoing extract from the opinion in *Thompson* vs. *San Antonio Ry. Co.* to the effect that a different result might be reached, *if the law was such* that a railway could charge for transportation only at some rate fixed by the commission, *no more* and *no less*, cannot be taken as an intimation that the existence of a statutory maximum rate is necessarily inconsistent with a higher special contract rate. The Court refers not to a mere maximum, but to a specific prohibition of any contract rates.

In the opinion of the Court in *Kellerman* vs. *Railroad Co.*, 34 S. W. 41, we find a judicial recognition of the possibility of the coexistence of a statutory max-

imum freight rate, a published schedule rate, and a rate fixed by special contract.

In this connection we would call attention to the following cases, in which it is held that a transportation company may make special contracts for transporting goods upon terms different from those provided by the regular schedule of rates.

Kansas Pac. Co. vs. *Bayles*, 22 Pac. 341, S. C. 35, Pac. 744;

Lough vs. *Outerbridge*, 38 N. E. Rep. 292, 143 N. Y. 271.

If it be suggested that if a contract calling for a rate lower than the official maximum were recognized as valid and binding, the subsequent establishment of an official maximum lower than the contract rate, could not affect the contract, and that in this way the authority of the supervisors might be set at naught, we answer that, even were it conceded that the purpose of the Act of 1885 was to prohibit all contract rates in excess of the maximum established in pursuance of the Act, it would not follow that contract rates might not be enforcible until the maximum was fixed at a lower figure.

But we do not admit that a contract rate higher than the maximum established under the Act of 1885 is repugnant to that Act.

We maintain that the requirement of the Act of 1885 that water shall be furnished at rates not exceeding the maximum established by order of the county supervisors, or by the schedule adopted and observed

by the supplier, is to be understood as confined to cases where no special rate has been fixed by contract. If the consumer prefers to take the water at the official or schedule rate, or if, for any other reason, no special rate is agreed upon, then the supplier can demand no greater compensation for water furnished than that fixed by the official rate or by the schedule rate, as the case may be. But it is altogether different where the consumer prefers to contract for a special rate which secures to him the advantage of freedom from the fluctuations characteristic of official and schedule rates, and which may be higher than these rates without offending either the letter or the spirit of the Act of 1885.

The object of the statutory provision that the supplier of water shall not collect excessive rates or refuse to furnish water at the established rates, is not to curtail the right of a consumer to enter into any agreement that he desires to adopt; but rather to arm him with the right to compel the supplier of water to furnish water at the established rates, and upon the established terms, *if the consumer prefers this arrangement to any other which he and the supplier can agree upon.* To prevent extortion; to preclude the possibility of the exaction of excessive compensation *against the will of the consumer*, by a refusal to furnish water on any other terms, was the end sought to be achieved by the legislation in question. The law having thus equipped the consumer with the power to demand water at the established rate, all danger of oppression by the supplier was

obviated; and the consumer could, in perfect safety, carry on negotiations and make bargains with the supplier, since the latter was no longer in a position to say to him, " you must take my terms or none ". What reason, then, could there be for forbidding the consumer to make any agreements with the supplier that he might see fit to make, and might desire to make? What possible advantage was there to be attained by confining the consumer to the rates and terms fixed by a board of supervisors, even though he might wish to adopt a different arrangement? We submit that there could be none.

In *South Boulder Co.* vs. *Marbell*, 25 Pac. (Colo.) 504, the Supreme Court of Colorado recognizes the principle that the fixing of water rates by public authority does not preclude the making of special contracts respecting the rates and terms upon which water shall be supplied. The special contract there in question was one by which an irrigation company promised to furnish a consumer a certain amount of water, year after year, at an annual rental fixed by contract. This rental was higher than the maximum rate fixed by commissioners, acting under the authority of a statute, like the California act of 1885. The Court said (p. 506):

> " Nor does the action of the commissioners in pursuance of the statute prevent consumers from making special contracts with the carrier regarding the rate, or from continuing under agreements already existing."

An analogous case is found in that of the liability of

a common carrier as an insurer of goods transported by it. For example, a railroad company is under a legal duty to act, to a certain extent, as an insurer of the safety of the goods which are entrusted to it for transportation. The company cannot refuse to carry the goods, nor insist upon exemption from liability as an insurer, as a condition precedent to accepting the goods for carriage. Yet, if the shipper desires to make special terms, and, in consideration of lower rates, or some other advantage, to agree that the railroad company shall not be liable as an insurer, there is no law or public policy to prevent such an agreement.

Western Trans. Co. vs. *Newhall*, 24 Ill. 466, 469, 473.

We contend that the statutory prohibition of the collection of rates exceeding the established maximum is on all fours with the common law prohibition of the carrying of freight by a common carrier otherwise than as an insurer. Both restrictions are imposed for the benefit of the customer, and may be waived by him if he considers it to his advantage so to do.

Another analogy is found in the case of a constitutional provision designated for the protection of the property of the citizen. It is competent for the citizen to waive the protection and consent to such action as would be invalid if taken against his will.

Endlich on Interpretation of Statutes, Sec. 537, quoting *Cooley on Constitutional Limitations*;
Robinson vs. *Bidwell*, 22 Cal. 379;
Harrelson vs. *Barrett*, 99 Cal. 607.

We are not unmindful that it is often insisted that the statute of 1885 was passed with a view to protect the rights of the public, and that therefore an individual consumer cannot have the power to waive the limitations imposed by these laws upon suppliers of water. The right of the public thus referred to is the right to be protected from discriminating and speculative contracts between the supplier and favored consumers.

It is submitted that it is unreasonable to contend that because contracts may be so drawn as foster discrimination, monopoly and speculation, it must be presumed that the Legislature intended, when it passed the Act of 1885, to sweep away all water contracts and all right to contract with reference to water. It seems to us that the presumption should be against the existence of an intention to adopt so drastic a measure.

It may be the duty of a water company to refrain from unreasonable discrimination between different applicants for water. But it is nevertheless true that special circumstances may justify special contractual arrangements, and that in such cases there may be such a thing as reasonable discrimination.

Kansas Pac. Co. vs. *Bayles*, 22 Pac. Rep. 341;
Lough vs. *Outerbridge*, 38 N. E. Rep. 292; 143 N. Y. 271;
Commonwealth vs. *Canal Co.*, 43 Pa. St., 295.

Nor is it reasonable to contend that because water rate contracts may be so framed and so used as to foster the holding of water for speculative purpose, therefore it

must be presumed that the policy of the Act of 1885 is antagonistic to all water rate contracts.

Condemning contracts of this type merely because it is possible to make a contract the instrument of unreasonable discrimination, or of speculation and monopoly—instead of simply forbidding undue discrimination and prohibiting the withholding of water from those who need it by those who seek to keep it, not for use, but for speculative purposes—is a policy which we think should not lightly be attributed to a Legislature.

If it should happen that, in time of scarcity, the contract holders should need all the water which the company could furnish, and that, consequently, other applicants for water could not get any, the situation would not present the case of an unreasonable monopoly. Practically the same situation would exist in the absence of any special contracts; for under section 552 of the *Civil Code*, the owner of lands on the line of the company's ditch, who has been furnished water by the company is entitled to the continuous use of said water in preference to later applicants.

Price vs. *Riverside L. & I. Co.*, 56 Cal. 431.

We repeat, then, that the fact that the right to contract with reference to water rights and water rates is susceptible of abuse, can furnish no reason for the presumption that the constitutional and statutory provisions relating to water were intended to operate as a

prohibition of all contracts concerning water and water rates.

In connection with the question as to the proper construction of the Act of 1885, we would direct the attention of the Court to the conspicuous dissimilarity between the language of the Act of 1885 and that of section 1 of Article XIV of the Constitution of California relating to the mode of fixing rates in municipalities. The constitutional provision contains a declaration that any supplier of water collecting water rates in any city and county or city and town, otherwise than as established by the governing body thereof, shall forfeit its franchise and water works. We do not admit that this is intended as a prohibition of voluntary agreements for rates different from the official ones, but even were it conceded that the language used might bear such a construction, it would still be true that, as we have already shown, the language of the Act of 1885 is entirely incompatible with the conclusion that the Act was designed to prohibit special contract rates. The Act clearly stops short of such a result, and goes no further than to provide for the establishment of maximum rates; and this we contend must remain true even though the constitutional provision should be construed as prohibitive of special contract rates.

The theory that the Constitution of California and the statute of 1885 are prohibitive of water rate contracts, if consistently followed out, leads to the con-

clusion that no valid contract can be made concerning services rendered by any individual or corporation in the course of a business which is charged with a public use, and which involves the exercise of a franchise. According to this contention, if a railroad company should sell a passenger a ticket for a sum less than that fixed by the Board of Railroad Commissioners, the ticket would be void and the passenger could be put off at any station on the line, and the railroad company be under no liability therefor.

Similarly, if a canal company desired a right of way over lands or a right to construct reservoirs thereon, and wished to agree to furnish water to the particular lands in question free, in consideration of a grant of the right of way, or of a reservoir site, or of both, the plan could not be carried out and the attempted contract would be void; and even though the land owner should allow the canal company to construct upon the land its canal or reservoir, or both, the company could not be compelled to furnish water in accordance with its promise. Such a doctrine is revolutionary, and it would overturn rights which have never yet been questioned. Such contracts have been treated as valid by the Supreme Court of California (see *Ferrea* vs. *Chabot*, 63 Cal. 564); and we think that the Court will take judicial notice of the fact that in numerous instances water companies have acquired rights of way and other privileges of great value, upon the faith of promises to furnish the land owner with water free of charge or at a specified charge.

If a railroad company should agree to furnish a pass in consideration of a right of way or a concession as to freight or any matter of that kind, the same would, according to the doctrine in question, be absolutely prohibited and void. No commutation ticket, no return ticket or any other limited ticket at a rate less than that fixed by law could be valid, because as soon as public control steps in the right of contract steps out, and every attempt to contract is void from the beginning.

If it is true that the Act of 1885 operates as a prohibition of special contracts with regard to water rates, then all statutes providing for the fixing of maximum railway rates for freights and fares must be prohibitive of special contract rates.

If all contracts for water rights and for special water rates are unlawful merely because such contracts may be so drawn as to be promotive of speculation, discrimination and monopoly, then it must be that all contracts for special railway rates, and all contracts determining the amount of compensation for services rendered in the course of any business affected with a public use, and involving the exercise of a franchise, must be unlawful and void. For in all such cases it could just as forcibly be argued that contracts may be framed in such a way as to tend towards discrimination, speculation and monoply.

We say, then, that all of the arguments in support of the proposition that there is a fatal antagonism be-

tween a contract for special water rates and the constitution and statutes of California, apply with equal force to the case of any business affected with a public use and subject to State regulation; and that a consistent application of the theory relied on to overthrow water rate contracts would result in the destruction of all contracts made in connection with any of these quasi-public enterprises.

We submit then that there is nothing in the Act of 1885, as originally adopted, which conflicts with the validity and legality of a contract fixing water rates, and this whether the contract rate be greater or less than the maximum fixed by the county supervisors or by the supplier, pursuant to the Act.

We now proceed to another consideration which is fatal to any objection to water rate contracts based upon the Act of 1885, and this is that

Even if the Act of 1885 as originally enacted could be construed as rendering contracts relating to water rights, illegal and contrary to public policy, this supposed taint of illegality was removed by the amendment of 1897, and thereby all such contracts became lawful and enforcible.

As we have already shown, the Act of 1880 was superseded by the Act of 1885, and the latter act is therefore the only one which can be relied on as constituting an obstacle to the enforcement of water rate contracts.

But on March 2nd, 1897, the Act of March 12th,

1885, was amended by the insertion of a new section, numbered 11½, and which reads as follows:

> "Nothing in this Act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section two of this act, relating to the sale, rental or distribution of water, or to the sale or rental of easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract."
>
> (Stats. 1897, p. 49).

The amendment is a declaration of the legislative policy from that time forth, with respect to existing as well as to future contracts; a declaration that whatever may have been the policy underlying the Act of 1885 as originally adopted, the prevailing policy from and after the time of this amendment, should be in favor of the validity of these contracts, and that even such of them as antedated the amendment should be enforcible, and free from the imputation of being contrary to the policy of the law.

It is true that a Circuit Court in a ruling made in the present case (*Lanning* vs. *Osborn*, 82 Fed. 577) declined to construe the amendment of 1897 as intended to validate contracts void when made. According to the view adopted by Judge Ross, the amendment did not purport to impart validity to any contract already made. He says, (p. 577):

> "The amendment does not purport to provide any manner of fixing water rates, nor does it

purport to make valid any contracts otherwise invalid."

But the construction which Judge Ross puts upon the amendment practically robs it of all significance, in so far as existing contracts are concerned.

It is evident that the amendment was intended to have some effect upon contracts already made; otherwise no reference to contracts "already made" would have been included in the amendment. And we submit that the purpose of the amendment of 1897 was not merely to announce the construction placed by the legislature of 1897 upon the Act of 1885, but in addition to this, to remodel the Act of 1885 so as to preclude the possibility of its being construed so as to conflict with contracts of the kind referred to in the new section.

This construction of the language of the amendment is one which that language will bear without any straining, and is in fact the only one that can be adopted without ignoring its express language. The declaration that nothing in the Act of 1885 should be construed so as to conflict with certain contracts, is an expression of the legislative will as to what the effect of the Act shall be. This form of expression is very common in cases where it is used with reference to the effect of the same Act in which it is found, and there is no reason why a different significance should attach to it in cases where it is used with reference to a prior act. It is submitted, then, that, whether or not the amend-

ment purports to make valid any contracts otherwise invalid, it does purport to enact that nothing in the Act of 1885 shall operate to interfere with the enforcement of contracts already made which, apart from that Act, would have been valid. If the effect of the Act of 1885, as originally adopted, was to render the water right contracts unenforcible and obnoxious to the public policy (which of course we deny), the enactment of 1897 removed this impediment and changed the statutory policy with respect to such contracts; provided, of course, that it was within the power of the legislature to pass a statute having such a retroactive effect as that just indicated.

Thus arises the question of whether there is anything in the Constitution of the United States, or the constitution of California which precludes the legislature from validating contracts which at the time of their inception were in conflict with the statutory policy of the state. We contend that there is not; and that even if the contracts here in question were, when made, obnoxious to some policy established by the Act of 1885, the amendment of 1897 was intended to, and did, remove this ground of objection to their validity and binding force.

A law validating invalid contracts does not impair the obligation of a contract, but confirms the contract.

Watson vs. *Mercer*, 8 Peters 88;
Satterlee vs. *Matthewson*, 2 Peters 380.

Where parties have entered into an agreement which

at the time of its inception was illegal, and in contravention of public policy, such an agreement becomes enforcible when the legislature sees fit to change the policy of the law, and to extend a legal sanction to transactions of a kind formerly reprobated and condemned. No one can have a vested right to repudiate his contract; and when, by a change of statutory policy, that which was illegal becomes legal, the enforcement of a contract formerly unenforcible because illegal and contrary to public policy, does not deprive the contracting party of a vested property right, but amounts to no more than compelling him to fulfill an obligation voluntarily assumed, and therefore morally binding.

To remove from a contract the taint of illegality is not to create a new contract; it is merely to withdraw a ground of objection which is founded upon the policy of the state, and which therefore can continue to exist only so long as the legislative power of the state consents to the continuance of the policy in question. Any policy which is not established by the constitution itself, is subject to change at the will of the legislature; and in so far as any objection to the contracts involved in the case at bar was based upon the policy established by the statutes of 1885, that objection was removable by the legislature at its pleasure; and, the objection having been removed, the contract stands just as if the objection, and the public policy to which it owed its origin, had never existed.

An examination of the decisions bearing upon this question will show that the position which we have just defined is well supported by authority.

In *White Water Co.* vs. *Valette et al.*, 21 How. (U. S.) 425, the rule is stated thus:

> "The objection that a contract is illegal, and that no judgment can therefore be rendered upon it, is not allowed from any consideration of favor to those who allege it. The Courts, from public considerations, refuse their aid to enforce obligations which contravine the laws or policy of the State. When the Legislature relieves a contract from the imputation of illegality, neither of the parties to the contract are in a condition to insist on this objection."

In that case, a corporation which had issued bonds secured by mortgage, sought to avoid the enforcement of the mortgage agreement on the ground that the contract in pursuance of which the bonds were issued, was obnoxious to the usury laws, and also on the ground that the corporation had no power, under its charter, to issue bonds secured by mortgage. It was held that, whatever doubts might have existed as to legality of the issue of the bonds, were disposed of by an Act of the State Legislature legalizing the bonds.

In *Ewell* vs. *Daggs*, 108 U. S. 143, it is held that a law which repeals usury laws, and destroys defenses to existing contracts on the ground of usury, does not deprive parties of vested rights, nor impair the obligation of contracts.

The Court held that a usurious contract was not an

absolute nulity, incapable of giving rise to any rights or obligations under any cirumstances; that the effect is the same, if the contract is, in fact, illegal, as made in violation of a statute, whether the statute declares it to be void or not; and that all that could be meant by the term "void and of no effect" as used in the usury statute, is that a Court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties, for the express purpose of carrying into effect that which is prohibited by the law of the land.

The opinion proceeds as follows:

> * * * "Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contracts is given to him by the statute, for purposes of its own, and not because it effects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains in *fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. * * * The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is unjust to insist upon, and which no constitutional provision was ever designated to protect."

In *Town of Danville* vs. *Pace*, 25 Gratt. 1, the subject of the constitutionality of retrospective statutes affecting the defense of usury is exhaustively discussed. It is held that although a usurious contract is, under the usury law there involved, void both as to principal and interest, the Legislature could nevertheless render the demand enforcible by repealing the usury law, concerning the contention that the repealing law, (which was clearly intended to be retroactive), was in conflict with the State Constitution, the Court said (page 11):

> "I do not understand the learned counsel for the defendant as contending that the Act in question violates any specific provision of that instrument. His proposition is substantially, that the contract here, when made, was usurious and void; and there was then vested in the defendant a right so to declare it; that by the statute now under consideration, he has been deprived of this right; that a law which thus takes away a valuable and a vested right is an arbitrary power, unjust in itself, and contrary to the fundamental principles of the social compact."

The opinion then goes on to review the authorities, and proceeds as follows:

> "The usury laws are founded upon considerations of public policy. They are modified from time to time, and even abolished, as the popular sentiment may dictate, or the public interest require. * * * * *
>
> "Unless we suppose it is the deliberate purpose of the debtor, when he borrows the money, never to return it, the only effect of the statute is to compel him to do what he intended and agreed to do at the time of entering into the contract. It is a

> legislative declaration that the forfeiture shall not be enforced. It leaves the contract to be executed according to its terms and the original intention of the parties. It violates no vested right, unless it be considered as a vested right of the loaner to vacate his contract and anihilate his debt. Clearly this is not the kind of right the constitution was designed to protect."

It is further decided in this Virginia case, that an act repealing a usury law is not open to the objection that it is an attempted exercise of judicial functions by the Legislature.

In *Andrews* vs. *Russell*, 7 Blackf. (Ind.) 474, it is held that, although a contract for the payment of illegal interest may be void while the prohibiting statute is in force, it is within the power of the Legislature to give force and obligation to the contract by means of a retroactive law.

To the same effect are:

Curtiss vs. *Leavitt*, 15 N. Y. 9;
Woodruff vs. *Scruggs*, 27 Ark. 26;
Welch vs. *Wadsworth*, 30 Conn. 149.

The analogy between a usurious contract and a contract for the sale of water for rates fixed in a manner not allowed by law, is very close. The water contract is no more a matter of public concern than the usurious loan. If public policy is involved in one case it is just as clearly involved in the other. If a water contract is illegal because the statute does not sanction, but on the contrary prohibits, the fixing of the rate of compensation by means of a contract, in the same way

a contract tainted with usury is illegal, and lacks the sanction of law and is prohibited by law. And if a party to a usurious contract has no vested right to insist upon its illegality as a defense, it follows that no such right can be vested in a party to an illegal water contract.

Another analogous case is that of a corporation which is forbidden by law to make certain contracts within a State. A contract may be within this inhibition and nevertheless the Legislature may, without violating any constitutional restriction, withdraw the inhibition, and thus render the contract enforcible, though it was made in violation of the law.

The decision in *Gross* vs. *U. S. Mortgage Co.*, 108 U. S. 477, is based upon this principle, as the following extracts from the opinion will show:

> "The opinion of the State Court (93 Ill. 483) in this case, shows that the decree is based upon these grounds: 1. That the law of Illinois in force when the mortgage of August 22, 1872, was executed, as well as its public policy, as disclosed in legislative enactments for many years prohibited the United States Mortgage Company from taking mortgages upon real property in that State, to secure the repayment of money loaned; consequently that no title passed to it under or by virtue of that mortgage. 2. That such mortgage, was however, validated by the act in force July 1, 1875.
>
> "That the act in question is not repugnant to the constitution as impairing the obligation of a contract is, in view of the settled doctrine of this Court, entirely clear. Its original invalidity was placed by the Court below upon the ground that

> the statutes and public policy of Illinois forbade a foreign corporation from taking a mortgage upon real property in that State to secure a loan of money. Whether that inhibition should be withdrawn was, so far at least as the immediate parties to the contract were concerned, a question of policy rather than of constitutional power. When the legislative department removed the inhibition imposed as well by statute as by the public policy of the State upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impairs the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to foreclose the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

The Court further held that the law in question was not open to the objection that it deprived the mortgagor (or the assignee of the mortgagor, who had assumed the mortgage), of property without due process of law.

Bleakney vs. *Bank*, 17 S. & R. 63, was an action by the bank upon a promissory note of date January 20th, 1820. The Supreme Court of Pennsylvania upheld the decision of the lower Court to the effect that by the omission of the plaintiff to pay the six per cent. tax on the dividend of November, 1819, the charter of plaintiff was forfeited, and the bank was dissolved, and rendered

unlawful and unincorporated; and every note taken by said bank after the first Monday of January, 1820, was null and void; but that the Act of April 1st, 1822, restored the bank and legalized the notes.

The Supreme Court said (p. 65):

> "This law divests no right, but removes an impediment or disability; it renders lawful an act prohibited, as if it had been lawful *ab initio;* it works no injustice; infringes no man's right; it impairs no contract; but takes from the contract the taint which the policy of the law interposed, and gives to the holder of the note a right to recover on the contract; a right which he would have possessed if there had been no legislative interposition; the party is restored to his common law right and common law remedy."

To the same effect is *Hess* vs. *Werts*, 4 S. & R. 356, a case concerning notes issued by a corporation not incorporated for banking purposes, which notes were by statute declared to be absolutely null and void, and to have no effect either in law or equity, and to be irrecoverable in any Court within the commonwealth. The defendant corporation, when sued upon certain of its notes, set up the defense that these notes were void, although after their issuance the Legislature had enacted that

> "so much of any act of the assembly heretofore passed, as deprives or prevents the holder of any note, ticket or engagement of credit, in the nature of a bank note from recovering from any individual, bank or corporation, association or partnership, by whom, or by any of whose officers or agents, the same has been made, signed or issued,

by reason of such note having been made, signed or issued without, or in contradiction to law, be, and the same is hereby repealed; and the holder of every such note shall have the same legal remedy for the recovery of the amount thereof, from the party or parties, whether corporate association, or partnership, or individual, who made, signed, or issued the same, as can, by the provision of this Act, or by the existing law of this commonwealth, be had on a similar note, ticket or engagement of credit, that has been lawfully issued."

The opinion of the Court contains the following (p. 358):

"The defendants contend, that by the Act of 1814, the contract was rendered void; and that it was not competent to the Legislature to create, by its repeal, a new contract for the parties, which, in point of law, had no previous existence. It certainly never was in the view of the Legislature to make a new contract, nor have they done so. The object of the Act of 1814 was, among other things, to restrain the circulation of the notes of unlawful banking associations; and for this purpose, notes are declared void." * * *

"I consider the case, therefore, on the broad ground of the contract having been void when made, and of no new contract having arisen since the repealing act. But by rendering the contract void it was not annihilated. The object of the Act of 1814 was not to vest a right in any unlawful banking association, but directly the reverse. The motive was not to create a privilege, or shield them from the payment of their just debts, but to restrain them from violating the law by destroying the credit of their paper, and punishing those who received it. How then can the defendants complain? As unauthorized bankers, they were violators of the law; and objects, not of protection,

but punishment. The repealing act was a statutory pardon of the crime committed by the receivers of this illegal medium. Might not the Legislature pardon the crime without consulting those who committed it; or does it lie in the mouth of another culprit, *particeps criminis*, to object, on the ground of impairing his interest, in having the punishment inflicted, when that interest arose from a violation of the very law under which he attempts to cover himself? How can the defendants say there was no contract, when the plaintiff produces their written engagement for the performance of a duty binding in conscience, though not in law? Although the contract for reasons of policy was so far void, that an action could not be sustained on it, yet a moral obligation to perform it, whenever those reasons ceased, remained, and it would be going very far to say the Legislature may not add a legal sanction to that obligation, on account of some fancied constitutional restriction."

Another instance of the validating of an illegal contract by a subsequently enacted statute is found in the case of a contract made in violation of laws against gaming.

In *Washburn* vs. *Franklin*, 35 Barb. 599, it is held that the defense to a contract, given by the statute against stock jobbing, might be taken away by a statute passed after the contract in question was made; and that a party to the contract had no vested right in the defense which the legislature could not take away.

This case is cited with approval by the Supreme Court of the United States in *Little Rock* vs. *Bank*, 8

Otto (98 U. S.) 308, as supporting the proposition that

> " where the consideration of a contract is morally good a repeal of the statute will validate the contract."

In *McMahon* vs. *Bohen*, 39 Conn. 316, it is held that it is within the power of the legislature to validate, by a subsequent statute, a contract which was originally unenforcible, because in violation of a law prohibiting the sale of intoxicating liquors.

In *People* vs. *Los Angeles Ry. Co.*, 91 Cal. 338, it was decided that the legislature may ratify and confirm a street railway franchise granted to a corporation upon terms not allowed by the law, as it stood at the time of the grant. At the time of the grant in question, section 497 of the *Civil Code* did not permit the granting of a franchise to operate a street railway by electric power. Subsequently the legislature passed an act confirming and ratifying ordinances granting such franchises. It was held that this validated the franchise in question.

Other instances of the validating of contracts by retroactive laws are found in the following cases:

In *Shaw* vs. *R. R. Co.*, 5 Gray 179, it was held that a mortgage by a corporation, of its franchises and property, might be validated by a statute passed after the execution of the mortgage, even though it may have been unlawful for the corporation to mortgage its franchises.

In *Dentzel* vs. *Waldie*, 30 Cal. 138, it is held that

a power of attorney to sell land made by a married woman at a time when the law did not permit married women to convey their separate property by an attorney in fact, was originally invalid and a deed by the attorney was likewise invalid; but that the legislature had the power to validate such powers of attorney and conveyances made thereunder. The Court said (p. 145):

> "The act in question does not divest the plaintiff of her title to the land in controversy. On the contrary it gives effect to the contract made by her fairly and in good faith by which she intended but failed to pass the title to another, merely because the proper legal forms were not observed. The same will which prescribed those forms has said that a non-compliance therewith shall be waived or excused, and the act held valid notwithstanding, and we find no constitutional impediment in the way."

We consider that the foregoing authorities fully justify the position that the amendment of 1897 had the effect of relieving all water-rate contracts from any taint of illegality which may have previously existed, although we of course deny that any such taint ever did exist.

The analogy between the law of 1885 and a usury law is very close. The object of both is to prevent extortion. To effect this end the law of 1885 prohibited the collection of water rates in excess of the maximum fixed in pursuance of law. Similarly the usury law prohibits the making of contracts for more than the legal rate of interest. The difference between the two laws is that the usury law does not

give the borrower the right to demand a loan at the legal rate, while the Act of 1885 does confer on the consumer the right to demand and receive water at the legal rate. Thus the Act of 1885 should not be construed as forbidding the making of contracts for water at a higher rate than the legally established one, since this is not the method of preventing extortion adopted by that act. That method is to give the consumer the right to demand water at the rate legally fixed, and this right is a complete bar to any possibility of extortion. On the other hand, the method of preventing extortion adopted by the usury law was merely to take away from borrowers the power of binding themselves to pay an excessive rate. If a usury law should be framed on the plan of giving the borrower the right to demand and compel a loan at the legal rate, there would be no necessity for construing it as a prohibition of contracts for a higher rate; for such contracts cannot be the result of oppression when the lender has no power to compel the borrower to agree to the higher rates on pain of being refused any loan whatever.

A usury law is thus very different from the Act of 1885 relating to water rights, in the respect which we have just indicated, and we direct attention to this difference to avoid the implication that because a usury law is very closely analogous to the Act of 1885, the latter Act should be construed as giving a defense to a party to a contract for water rates higher than those established by law. But the two laws are very similar

in other respects. Their object is the same—the prevention of extortion—and both are expressive of the same public policy.

In the case of the supplier of water, just as in the case of the supplier of money, the policy of the law is to prevent the supplier from taking an undue advantage of the necessities of the parties to whom the water or money is to be supplied.

The usury law is based upon consideration of public policy to the same extent that the law regulating water rates is based upon public policy. This is apparent from a consideration of the reasoning in *Munn* vs. *Illinois*, by which the Court reached the conclusion that a business affected with a public use is subject to legislative regulation. The case of usury laws was relied on as one of the illustrations of how a business can be affected with a public use, and the usury laws were relied upon as examples of the regulation of a business on considerations of public policy.

We therefore repeat that if there ever was any valid objection to the water rate contracts on account of their being opposed to the provisions of the Act of 1885 (which of course, we do not admit), every such objection was completely removed by the amendment of 1897.

A contract fixing the rate of a water supplier's compensation is supported by a valid and adequate consideration; it is not nudum pactum.

If the contract rate is less than that established by the Supervisors or the water company, there is clearly a consideration moving to the consumer; since he secures, by the contract, a rate more advantageous than that at which the supplier is already under a legal obligation to furnish water.

If the contract rate is higher than that fixed by the Supervisors or by the supplier's schedule, there is still a consideration for the consumer's promises.

Under the contract the rates are stable, reliable, unvarying. Apart from the contract the rates to which the consumer is entitled must be uncertain, fluctuating and unreliable. Protected by the contract the consumer can be assured that, no matter how high the rates may be raised by the Supervisors, he can always have his water at the same rate, and can always be in a position to estimate with accuracy the expenditures which in the future, he will find it necessary to make in connection with the irrigation of his land. It cannot be that this certainty and security and uniformity is of no value; or that it can be regarded as of such infinitesimal importance that its presence cannot save a contract from the fate of a *nudum pactum*

On the contrary it is evident that this right to uniform and unvarying rates is, of itself sufficient to constitute an adequate consideration.

In conclusion, we invite attention to the fact that, for all that the record in the case at bar discloses, it may be that the San Diego Land and Town Company is the owner of water which was appropriated prior to the adoption of the Constitution of 1879. It is submitted that it should be presumed that such is the case, until the contrary is shown. This matter has a direct bearing upon the question whether an irrigation company can, under the Constitution of 1879 be the *proprietor* of the water which it sells, rents and distributes. There can be no doubt that such a proprietorship was possible under the California Constitution of 1849, and the new constitution could not have the effect of destroying rights vested under the old constitution, since this would be in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

JOHN GARBER and
FRANK H. SHORT.

Amici Curiæ.

Appendix.

An Act to regulate and control the sale, rental, and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use.

[Approved, March 12, 1885.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for irrigation, sale, rental, or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several Boards of Supervisors thereof, in the manner prescribed in this Act.

SEC. 2. The several Boards of Supervisors of this State, on petition and notice as provided in section three of this Act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association or corporation, having or to have appropriated water for sale, rental, or distribution, in each of such counties, may and shall sell, rent, or distribute the same.

SEC. 3. Whenever a petition of not less than twenty-five inhabitants, who are taxpayers of any county of this State, shall, in writing, petition the Board of Supervisors thereof, to be filed with the Clerk of said Board, to regulate and control the rates and compensation to be collected by any person, company, association, or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them, whose water rates

are therein petitioned to be regulated or controlled, the Clerk of such Board shall immediately cause such petition, together with a notice of the time and place of hearing thereof to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less than four weeks next before the hearing of said petition by said Board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said Board, not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations, mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment.

SEC. 4. At the hearing of said petition the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company or corporation, whose franchise shall be so regulated and controlled; and shall in like manner estimate as to each of such persons, companies, associations, and corporations, their annual reasonable expenses, including the cost of repairs, management, and operating such works; and, for the purpose of such ascertainment, may require the attendance of persons to give evidence, and the production of papers, books, and accounts, and may compel the attendance of such persons and the production of papers, books, and accounts, by attachments, if within their respective counties.

SEC. 5. In the regulation and control of such water rates for each of such persons, companies, associations, and corporations, such Board of Supervisors may establish different rates at which water may and shall be sold, rented, or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing, and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six or more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations, and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or waterworks shall not be included as part of the said expenses of management, repairs and operating of such works, but when accomplished, may and shall be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances, and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable, and just, both to such persons, companies, associations, and corporations, and to said inhabitants. The said rates, when so fixed by such Board, shall be binding and conclusive for not less than one year next after their establishment, and until es-

tablished anew or abrogated by such Board of Supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such Board of Supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing, or that shall hereafter furnish, appropriated waters for sale, rental, or distribution to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof.

Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants as hereinbefore provided, or upon the written petition of any of the persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice, and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association, or corporation, or any number of them, in the same manner as if such rates had not been previously established, and may, upon the petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such Board. All water rates, when fixed and established as herein provided, shall be in force and effect until established anew or abrogated as provided in this Act.

Sec. 7. Each Board of Supervisors of this State,

when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for the publication or posting of said petitions and notices.

SEC. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town, therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as fixed and established by such person, company, association, or corporation, as provided in this act.

SEC. 9. If any person, company, association, or corporation, whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable, in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant, with costs of suit.

SEC. 10. Every person, company, association, and corporation, having in any county in the State (other than in any city, city and county, or town, therein), appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money, of such established water rates, shall be obliged to sell, rent, or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, whether so fixed by the Board of Supervisors or otherwise, to the

extent of the actual supply of such appropriated waters of such person, company, association, or corporation for such purposes. If any person, company, association, or corporation, having water for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand, to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered, with costs.

SEC. 11. Whenever any person, company, association, or corporation, shall have acquired the right to appropriated water, or shall have acquired the right to appropriate such water in this State, such person, company, association, or corporation, may proceed to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

SEC. 12. This Act shall take effect and be in force from and after its passage.

No. 201.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 201.

H. C. OSBORNE ET AL., APPELLANTS,

vs.

THE SAN DIEGO LAND AND TOWN COMPANY OF MAINE, APPELLEE.

STIPULATION.

It is hereby stipulated that the opinion of the court below may be printed from the Federal Reporter, volume 76, pages 319 *et seq.*, as being a true copy of the original filed, and that the certificate of the clerk of the circuit court to a copy of said opinion is waived.

A. HAINES,
Of Counsel for Appellants.
JOHN D. WORKS,
Of Counsel for Appellee.

[Endorsed:] Case No., 17,286. Supreme Court U. S., October term, 1899. Term No., 201. H. C. Osborne *et al.*, appellants, *vs.* The San Diego Land & Town Co. of Maine. Stipulation that the opinion of the court below be printed from Federal Reporter, &c. Filed M'ch 20, 1900.

CHARLES D. LANNING, *Receiver of San Diego Land and Town Company of Kansas, Complainant,*
vs.
H. C. OSBORNE ET AL., *Defendants.*

Opinion of the Circuit Court Delivered on Ruling upon Complainant's Exceptions to Original Answer in the Original Cause, Filed September 14, 1896.

ROSS, *Circuit Judge:*

The bill in this case alleges, among other things, that the San Diego Land and Town Company, of which the complainant is the duly appointed and qualified receiver, is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and at the times mentioned in the bill was doing business in the State of California; that during all the times mentioned the company was and still is the owner of valuable water, water rights, reservoirs, and of a pipe system for furnishing water to consumers for domestic, irrigation, and other purposes, and of a franchise for the impounding, sale, distribution, and disposition of such waters to the defendants and other consumers, and to the city of National City, in this State, and its inhabitants; that its main reservoir and supply of water is and was at the time mentioned situate in a small stream called the Sweetwater river, in San Diego county, distant about five miles from National City, and that its system of reservoirs, mains, flumes, aqueducts, and pipes covers and can supply a limited amount of territory, consisting of certain farming lands within and outside of National City and in part of the residence portion of that city; that the company, in procuring the water and water rights, reservoirs, and distributing system owned by it and in preparing itself to supply consumers with water, expended up to January 1,

1896, $1,022,473.54, which was reasonably necessary for those purposes; that by the expenditure of that sum of money the company procured and owns, subject to public use and the regulation thereof by law, the property mentioned; that the capacity of its reservoir is six thousand millions of gallons of water; that the defendants are the owners respectively of tracts of land under the company's water system, most of the defendants owning and holding small tracts of only a few acres each; that each of the defendants has, by purchase or otherwise, become the owner of a right to a part of the water appropriated and stored by the company necessary to irrigate his tract of land, and is liable to pay for the use thereof such rental as the company is entitled to charge and collect; that the annual expense of operating and keeping in repair the reservoir and water system of the company and of furnishing the consumers with water is, including interest on its bonds and excluding the natural and necessary depreciation of its system, $33,034.99; that in order to pay the company the amount of its annual expenses and an income of 6 per cent. on the amount actually invested in its water, water rights, and water system up to the first day of January, 1896, it is necessary that rates for the water sold and consumed be so fixed as to realize to the company the sum of $119,791.66; that the total amount that was realized by the company from sales of water and water rights and from all other sources on account of its business of supplying water to consumers outside of the city of National City for the year ending January 1, 1896, was about $13,000, and that no more than that sum can probably be realized for the year ending January 1, 1897, at the rates now prevailing; that all of the mains and pipes of the company and other parts of its property used in furnishing water to consumers are perishable property and require to be replaced at least once in sixteen years and require frequent repairs; that in order to acquire the water and

water rights and to construct its system of water works the company was compelled to and did borrow $300,000, and that it is compelled to pay as interest thereon $21,000 annually, which sum must be realized from the sale of its water and is a part of its operating expenses; that the proportionate share of the revenues of the company that should be raised by water rates within the limits of National City, as compared with the revenues that should be raised and paid as rates by consumers outside of that city, is about one-third; that the amount that can be realized from that city and its inhabitants per annum from the rates now prevailing under the ordinance established by that municipality is about $10,715 and no more; that the value of the water, water rights, reservoirs, franchises, and property necessary for the proper operation of the business of the company and now held by it is $1,100,000, and that the same is necessary for the use of the company in furnishing water to the defendants and other consumers; that the city of National City is a municipal corporation of the sixth class, organized under the general laws of the State of California, and that the rates to be charged for water within the city are fixed by its board of trustees, as provided by law; that the company commenced to furnish water to consumers in the year 1887; that it was then informed by its engineer that its system and the supply of water that could be stored thereby would furnish water to consumers sufficient to irrigate 20,000 acres of land, and would supply such water in addition thereto as would be necessary for domestic use inside and outside of the city of National City; that the company was then unfamiliar with the operation of a plant and system of the kind constructed by it, and did not know what the cost of operating and maintaining the same would be; that relying upon the report and estimate of its engineer, and believing that, by fixing and charging an annual rate of $3.50 per acre for irrigation, it could meet its operating expenses and pay it some

interest on its investment, it fixed and established and has since charged the rate of $3.50 per annum and no more until January 1, 1896; that instead of being able to supply from its system water sufficient to irrigate 20,000 acres, it has been demonstrated by actual experience that the system will not supply water sufficient to irrigate to exceed 7,000 acres, together with the water demanded for domestic use, and probably not to exceed 6,000 acres, although there are about 10,000 acres under the system susceptible of irrigation; that at the rate of $3.50 per acre, if water should be demanded and used upon the whole of the lands which the system is able to supply with water, and rates are allowed in National City equally high for domestic use and irrigation, the company would not be able to pay its operating expenses and maintain its plant and system, and that the company has been and still is, under the rates mentioned, losing money every year, and its plant and system has been and is gradually going to decay from natural depreciation consequent upon its use in supplying consumers with water without any revenue or means being provided for replacing the same, whereby the system and the money invested by the company therein will be wholly lost to it, and it will, if the rate of $3.50 per acre be maintained, be compelled to furnish water to consumers at an actual and continual loss; that in order to pay the cost of operating the plant and maintaining the same and pay the company a reasonable interest on its investment or a reasonable sum for its services in supplying water to the defendants and other consumers, it will be necessary for it to charge a rate per acre per annum of not less than $7 for irrigation purposes, which sum is a reasonable rate for consumers to pay, and the smallest amount for which the company can furnish the water without loss to it; that by the laws of the State of California the board of supervisors may, upon the petition of twenty-five inhabitants who are tax-payers of the county, fix the rate of

yearly rental to be collected by the company, but no such petition has ever been presented or rates fixed in the case of the company; that for the reasons stated the company gave notice to the defendants that on January 1, 1896, it would establish a rental of $7 per acre per annum for water supplied to their and each of their lands for irrigation, and that from and after that date they and each of them would be required to pay that sum for the irrigation of their and each of their lands, and that the receiver, after his appointment and before the date mentioned, gave a similar notice; that the defendants and each of them refused to pay the rate of $7 per acre, and maintained that neither the company nor the receiver has any legal right to increase the amount of rental to be paid by them or any of them, and that the rate of $3.50 established and collected by the company must be and remain the established rate of rental until a rate is established by the board of supervisors of the county in which the plant is situated; that an increase of the rate is absolutely necessary to enable the receiver to maintain and operate the plant and pay the expenses of its maintenance and operation as he is required by law to do; that, in order to enforce the payment of the rate so fixed, the receiver caused the water to be shut off from the premises of the defendants and each of them until such rates are paid, and that the defendants threatened to and will, unless restrained from so doing by this court, commence suits in the superior court of the county of San Diego, State of California, to compel the receiver to turn on and furnish water to their lands without the payment of $7 per acre rental, on the ground that they are entitled to the use of the water for $3.50 per acre, and for damages for cutting off the said supply of water; that the rights of the defendants are the same and the determination of the question of the right of the company and of the receiver to increase the rate of rental to be charged and collected affects all of the defendants in the same way

and to the same extent, except that the quantity of land owned by the several defendants is different; that the bringing of such suits by the defendants separately will involve the company, the receiver, and the defendants in a multiplicity of suits, and put them and each of them to great and unnecessary cost and expense and seriously hinder the receiver in the proper operation and management of the property of the company and the settlement of its outstanding debts, liabilities, and obligations, while all of the questions involved in such litigation and the rights of all the parties in interest can be better settled and determined in one suit, and vexatious litigation and unnecessary expense and consequent unnecessary interference with the receiver's management and control of the property and business of the company be thereby avoided; that the proposed increase in rates will add to the revenue and earnings of the company from the sale and distribution of the water from its system with the amount of land now under irrigation not less than $14,000 per annum, and upon the whole of the lands that can be irrigated under the system of the company of not less than $21,000 per annum.

The prayer of the bill is that the defendants and each of them be enjoined from prosecuting in the State courts or elsewhere separate actions against the receiver or the company growing out of the matters alleged; that the defendants and each of them be required to appear in this suit and set up any claims they may have against the right of the receiver or the company to increase the rate for water so furnished, and that it be finally decreed by the court that the receiver and the company have the right to increase the rate to any reasonable sum, and that the sum of $7 per acre per annum is a reasonable rental to be charged for irrigation, and that the defendants and each of them be required to pay that rate as a condition upon which water shall be furnished them, and for such other and further relief as the nature of the case may demand.

The answer of the defendants, to which exceptions are taken, alleges, among other things, that the purposes for which the San Diego Land and Town Company was incorporated are "the encouragement of agriculture and horticulture, the maintenance of public works, the maintenance of a public and private cemetery; the purchase, location and laying out of town sites, and the sale and conveyance of the same in lots and subdivisions or otherwise; the supply of water to the public; the erection of buildings and the accommodations and loan of funds for the purchase of real property; the establishment and maintenance of a hotel; the promotion of immigration; the construction and maintenance of sewers; the erection and maintenance of market-houses and market places; the construction and maintenance of dams and canals for the purpose of water works, irrigation, or manufacturing purposes; the conversion and disposal of agricultural products by means of mills, elevators, markets and stores or otherwise; the accumulation and loan of funds; the erection of buildings and the purchase and sale of real estate for the benefit of its members. And the construction and maintenance of such other improvements as may be necessary or desirable for the proper exercise of any or all such corporate purposes." The answer admits the appropriation of the waters in question by the company for the purposes stated in the bill, and alleges that the company acquired a portion of its reservoir site by condemnation proceedings under the laws of the State of California, and that it has exercised and does exercise its franchise to furnish the water by virtue of the comity of the State of California and subject to the conditions prescribed by the constitution and laws of that State. The answer avers that the quantity of farming and orchard lands within and without National City lying under the flowage of the company's reservoir and within the reach of its supply of water is about 12,000 acres; that the capacity of the reservoir is sufficient to supply water needed for the irrigation of 9,000 acres of

land, and also for the domestic and other uses and needs of a population when settled thereon and in National City of at least 20,000 persons; that of the 12,000 acres of farming and orchard lands lying under the company's system, the company, in January, 1887, owned and held for the purpose of sale, use, and profit about 7,000 acres; that the portion of the territory of National City that it in January, 1887, laid out into town lots, comprised 6,691 lots, of which the company then owned 2,849; that the lands of the company owned by it in January, 1887, irrigable from its reservoir and distributing system are situate in the Sweetwater valley, in Chula Vista and in National City, and within the boundaries of National ranch, in the county of San Diego, and also in Otay valley, in the same county, adjoining National ranch on the south, and in the territory known as "Ex-Mission lands," adjacent to National City on the north, and that the lands described, together with the lots owned by the company, form virtually one continuous tract extending from near the base of the Sweetwater reservoir westward to the bay of San Diego and from the Otay valley on the south to the boundaries of the city of San Diego on the north and west; that the lands and lots as owned in January, 1887, by others than the company are in detached parcels, scattered among the lots and lands of the company; that the lands of the company were in January, 1887, entirely unsettled and in their natural state, and were almost entirely arid and of but little value without water for irrigation; that the city lots owned by the company were at the same time vacant and unimproved and of little value, except in anticipation of settlement of the lands under the water system and of the anticipated growth of the population of National City; that the lands and lots belonging to the defendants and others than the company were also at that date largely unsettled and in their natural state, and were of the same general character as those of the company; that the company, being desirous of selling its lands

and lots and of taking advantage of the speculative conditions then prevailing in southern California, made the appropriation of the waters of the Sweetwater river and planned and executed the construction of the reservoir and water system primarily to serve and settle its own lands and lots and the inhabitants, who by promise of such water should be induced to purchase the same, and that the company's water system was constructed to serve incidentally only the lands of others than the company; that in part execution of its project, the company laid out and platted its tract known as Chula Vista, consisting of about 5,000 acres, in blocks of forty acres each, and subdivided the blocks into lots of five acres each, and laid pipes therein so as to reach and serve each five-acre lot; that in further execution of its project, the company laid pipes in the streets of National City, so as to reach its vacant city lots, as well as any inhabited lot along its lines of pipes, and also so as to reach its farming lands within the city, and extended its pipes through the city to serve and irrigate 390 acres of the Ex-Mission lands, and also laid pipes in the Sweetwater and Otay valleys and elsewhere in National ranch, to reach and serve its lands there situated; that nine-tenths of the company's distributing pipe system, when laid and ready for operation in February, 1888, was so laid in anticipation of future use and payment for the water, and not for any use or demand then existing, and that when laid it was and to a great extent still is ahead of the demands therefor, and that much thereof has laid unused.

The answer further alleges that from the inception of its enterprise until January 1, 1896, the company held its farming and orchard lands and its lots in National City for sale, and as an inducement to their purchase, both privately and publicly and continuously, represented that the water of its system was piped to and over its lands and lots and was and would be supplied to purchasers thereof for irrigation at the rate of $3.50 per acre per annum for farming and

orchard lands and for city lots in ample quantity and at cheap rates; that the lands of the company in the Sweetwater and Otay valleys and in the Ex-Mission without water have at no time been worth more than an average of $35 per acre, and in Chula Vista no more than from $75 to $100 per acre; that with the appurtenant water supply the company has at all times since early in the year 1887 held its raw lands in the Sweetwater and Otay valleys and in the Ex-Mission at an average price of $250 per acre, and in Chula Vista at prices ranging from $300 to $500 per acre, except that it offered and sold about six five-acre tracts of its Chula Vista lands at $150 per acre as an inducement to the first few purchasers to locate thereon, and has at all times held its land other than town lots within the city of National City, together with the annexed water supply, at from $350 to $500 per acre.

The answer alleges that prior to the bringing of this suit the company, upon the representation that the annual rate of water for irrigation was and shall be $3.50 per acre, sold to certain of the defendants and their predecessors in interest certain of its lands, aggregating 714 acres, at the enhanced prices mentioned, with the easement of water annexed as an incident and appurtenant thereto, and that each purchaser thereof respectively relied upon the representations of the company that the annual rate for water to be supplied for irrigation was and would remain not higher than $3.50 per acre, and that in each of those cases the company, prior to making its conveyance, connected the land so sold with the actual flow of water of its system, both for irrigation and domestic and other uses; and in respect of lands so sold by the company in Chula Vista, it exacted from and imposed upon each of the purchasers his obligation to erect a residence thereon at once, to cost not less than $2,000.

The answer further alleges that up to December, 1892, the company made no express or separate grant of "water

rights" as appurtenant to the lands so sold by it, but granted the easement of the flow and use of the water from its system as appurtenant to the land sold, "and contracted for and received compensation for the land and appurtenant water right in a single price for both;" that after December, 1892, the company in all cases of sales of its lands by an express contract in writing specifically sold to those defendants who purchased lands from it that purtenant water right, and that each of such contracts contained the following provisions (the description of the land and the price for the same with the water being adapted to each case respectively), to wit: "That in consideration of the stipulation herein contained, and the payments to be made, as hereinafter specified, the party of the first part (the company) hereby agrees to sell unto the party of the second part; and the party of the second part agrees to purchase of the party of the first part the following real estate, to wit (description), together with a water right to the one-acre foot of water per annum for each and every acre of said above-described real estate, to be delivered by the party of the first part through its pipes and flumes at a point —; said water to be used exclusively on said real estate, and to become and be appurtenant thereto and not to be diverted therefrom; provided that the party of the first part may change the place of delivery of said water, so long as the same is near the highest point of said land. For which land and water right the party of the second part agrees to pay the sum of — dollars; and the party of the second part further agrees and binds —self, — heirs, executors, and assigns to pay the regular annual water rates allowed by law and charged by the party of the first part for the water covered by said water rights, whether said water is used or not, and to pay for all water used on said land for domestic purposes monthly, under such rules and regulations for the delivery of water to consumers as the party of the first part may from time to time make"

The answer further alleges that the title to about 970 acres

in the aggregate of lands lying outside of National City and acquired by certain defendants was not derived from the company, in respect to which the company furnished water up to December, 1892, without exacting a price for a water right, but voluntarily annexed the perpetual easement of the flow and use of water from its system to such lands and voluntarily treated those tracts as it did all tracts sold by it to other defendants, and that from the beginning of its service of water the only water rates actually established and collected by the company for water furnished by it to land not sold by it have been the same as for water supplied to lands it sold.

The answer further alleges that from and after December, 1892, the company refused to furnish water to irrigate other or further lands under its system not owned or sold by it except upon the payment of a sum in gross for the water right, over and above the uniform annual rate as actually established and collected from all of the lands under the system; that it first fixed the price of such water rights at $50 per acre, and later raised the same to $100 per acre, and that from December, 1892, it furnished no water to irrigate any of the lands not sold by it, except upon payment of the price fixed by it for a water right under a contract for the sale of such water right containing the following provisions (the filling of the blanks being adapted to each case), to wit: "That the party of the first part (the company) agrees to and does hereby sell to the party of the second part a water right to one-acre foot of water per acre per annum for each and every acre of the real estate hereinafter described, to be delivered through the pipes and flumes of the party of the first part — for the sum of — dollars, payable as follows: —; provided the party of the first part may, at its option, change the place of delivery of said water, so long as the same is near the highest point on the lands for which the water is delivered under and in accordance with the rules and regulations established from time to time by the party of the

first part. Said water right is sold for the use of and to be appurtenant to the following-described real estate now owned by the party of the second part in the county of San Diego, State of California, to wit, —, consisting of — acres; and it is expressly understood and agreed that the water right hereby sold shall belong to said described real estate and be used thereon and not diverted therefrom or used on any other lands. In consideration of the foregoing stipulations and agreements the party of the second part agrees and binds —self, — heirs, executors, and assigns to pay the sums above specified promptly as the same and each of them falls due, and that — will in all things comply with and perform the terms and conditions of this agreement on — part to be performed, and that — and they will promptly pay all annual water rates and charges for the water to which — is entitled under and by virtue of this agreement, at rates fixed by the party of the first part as allowed by law and at the times, in the manner and according to the rules and regulations made and adopted by the party of the first part; the annual rental for the amount of water to which the party of the second part is entitled under this contract to be paid whether the same is used or not, and also to pay for all water used by — on said land for domestic purposes at the rates fixed by the party of the first part and allowed by law."

The answer alleges that under such contracts as that last quoted the company conveyed appurtenant water rights to about 200 acres of the lands to certain of the defendants.

The answer further alleges that the defendant J. M. Ballou owns a water right by virtue of a special written contract with the company, making such water right appurtenant to his land, and for a valuable consideration by him paid to said company and under the following provisions: "Provided, that said party of the second part shall make application in the form provided by the company for the use of the water and use the same under the same restric-

tions and conditions, and to pay said party of the second part the current rate therefor as established for Chula Vista; provided, said restrictions and conditions are not inconsistent with the water right hereby granted to said party of the second part."

The answer further alleges that certain of the defendants who are owners in the aggregate of 400 acres of what is known as the Ex-Mission lands have annexed to them water rights by virtue of a written contract with the company which reads as follows: "The parties of the first part will make application for the use of the water upon the form provided by the party of the second part for that purpose, and pay for the use of the water at the current rates as may be enforced from time to time for supplying lands in National ranch and subject to the same general rules and regulations."

The answer further alleges that on or about June 3, 1895, the company established a classification of lands which had been or should be provided with water by its system, to take effect July 1, 1895, and afterward confirmed the same to take effect January 1, 1896, and that such classification has been adopted by the receiver and is in words following, to wit: "Tenth. For the purpose of fixing rates for irrigating acre property, the lands of that character are classified as follows: All lands to which the easement and flow of water for irrigation has been or shall be annexed by the consent or voluntary act of this company shall constitute the first class. All lands to which the easement and flow of water for irrigation has not been or shall not be annexed by the consent or voluntary act of this company shall constitute the second class."

And that in respect of such second class of lands, the company at the same time promulgated the following, to wit: "In addition to said annual rate for water used upon lands of said second class, there shall be paid upon the lands of said class an annual charge equal to 6 per centum

of the value of the right to said easement and flow of water for irrigation, which said value shall be taken as one hundred ($100) dollars per acre."

The answer alleges that the lands of each and all of the defendants fall within the first class so defined by the company and the receiver.

The answer avers that neither of the defendants is in any event liable for more than his respective due proportion of the annual expense of the repair, maintenance and operation of the company's water system: that such of their number as have purchased lands with water rights appurtenant thereto from the company and such of their number as have purchased water rights made appurtenant to their lands not bought of the company have each and all paid the full amount demanded by the company as the price of the perpetual easement of the water supplied thereto by the company, and avers that such easements are, respectively, servitudes upon the company's water system, and have been fully paid for, and that the owners of such lands are forever discharged and acquitted from payment of any further sum or sums to apply on the principal of or as income upon the cost or value of the water company's system or any debt incurred by the company for construction thereof. And the defendants "allege that said company, in each of said cases, received satisfaction for, from, and parted with to, each such defendant or to his and her predecessor in interest so much of its franchise to demand and collect water rentals proportioned to said lands as corresponded or related to interest or income on the cost or value of said system or to net annual receipts and profits thereof or therefrom; and that it retained and now holds only so much of its said franchise proportioned to said lands as relates to the due proportion of the annual reasonable expenses of the repair, management, and operation of such system; and that in said respects it has at all times put all other lands to which it has voluntarily annexed said water

rights upon the same footing, and that all such lands have remained on the same footing for more than five years; that said lands have in many cases changed owners while so supplied with water at the same rates and on the same footing as to water rights with the land sold by the said company with annexed water rights as aforesaid; that the value of said water rights has for more than five years entered into the market value of said lands, and has in all cases been paid for to their vendors by the present owners, these defendants, who are successors in title by mesne or immediate conveyance of the lands to which, during the former ownership, the company voluntarily annexed said perpetual easement and water rights, and that neither any such lands nor the owners of any thereof are in any event liable for any other or further water rentals than are the lands, the ownership of which with said water rights were derived from said corporation."

Copious extracts have thus been taken from the answer to show the grounds upon which it is strenuously contended the water in question must be continued to be furnished to the defendants for irrigation at the annual rate of $3.50 per acre.

At the time of the adoption and taking effect of the constitution of California of 1879, the provisions of section 552 of the Civil Code of that State were, and yet are, as follows:

"Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water,

upon the same terms as those who have purchased their land of the corporation."

Sections 1 and 2 of article XIV of the constitution of 1879 are as follows:

"SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: *Provided*, That the rates of recompensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city or county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use.

"SEC. 2. The right to collect rates of compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot

be exercised except by authority of and in the manner prescribed by law."

The late case of San Diego Land and Town Company *vs.* City of National City, decided by this court and reported in 74 Fed. Rep., p. 79, presented the question, among others, whether that company had the legal right to demand and receive a sum of money in addition to the annual rates it was authorized to charge as a condition upon which it would furnish water appropriated by it under the constitution and laws of California to the persons for whose use the appropriation was made. The thing for which that company demanded a sum of money in addition to the annual rates it was by law authorized to charge it designated as a "water right." In that case this court said: "It does not change the essence of the thing for which the complainant demands a sum of money to call it a 'water right,' or to say, as it does, that the charge is imposed for the purpose of reimbursing complainant in part for the outlay to which it has been subjected. It is demanding a sum of money for doing what the constitution and laws of California authorized it to appropriate water within its limits, conferred upon it the great power of eminent domain, and the franchise to distribute and sell the water so appropriated, not only to those needing it for purposes of irrigation, but also to the cities and towns, and their inhabitants, within its flow; for which it was given the right to charge rates to be established by law, and nothing else. No authority can anywhere be found for any charge for the so called 'water right.' The State permitted the water in question to be appropriated for distribution and sale, for purposes of irrigation, and for domestic and other beneficial uses; conferring upon the appropriator the great powers mentioned and compensating it for its outlay by the fixed annual rates. The complainant was not obliged to avail itself of the offer of the State, but choosing, as it did, to accept the benefits conferred by the constitution and laws of California, it ac-

cepted them charged with the corresponding burden. Appropriating, as it did, the water in question for distribution and sale, it thereupon became, according to the express declaration of the constitution, charged with a public use. 'Whenever,' said the supreme court of California, in McCrary *vs.* Beaudry (67 Cal., 120, 121; 7 Pac., 264), 'water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.'"

In the present suit this ruling of this court is assailed, and it is said for the company that it is opposed to the ruling of the supreme court of California in the cases of Fresno Canal Company *vs.* Rowell (80 Cal., 114), and Fresno Canal Company *vs.* Dunbar (80 Cal., 530); that in those two cases the supreme court of California expressly recognize the existence of such a right and enforced it in behalf of such water companies.

An examination of those cases clearly shows that counsel is altogether mistaken in his statement; no such question was there raised, considered, or decided. In neither of those cases did it anywhere appear that the water, a part of which the Fresno Canal Company undertook to sell, in the one case, and to furnish in the other, was appropriated by the company under or by virtue of the constitution and laws of California, nor was it suggested in either case that the water had otherwise become subject to the public use declared by the constitution and laws of California, and for that reason that only legally established rates could be charged for its use. But a similar question did arise in the supreme court of Colorado in the case of Wheeler *vs.* North-

ern Colorado Irrigating Company (17 Pac. Rep., 487), and was there decided in precise accord with the ruling of this court in San Diego Land and Town Company *vs.* The City of National City (*supra*). The provisions of the constitution of Colorado were, at the time the case cited arose, as follows:

"SEC. 5. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

"SEC. 6. The right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

"SEC. 7. All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

"SEC. 8. The General Assembly shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

In the Colorado case the pleadings showed the water com-

pany to be a carrier and distributer of water for irrigation and other purposes, with a canal upward of sixty miles in length, and capable of supplying water to irrigate a large area of land. It had undisposed of a sufficient quantity of water to supply the wants of the relator, who was one of the land-owners and consumers under the canal, and who could obtain water from no other source. He tendered the amount of the annual rental fixed by the company, and demanded the use of water for the current season, but the company demanded as a condition precedent to the granting of his request that he buy in advance "the right to receive and use water" from its canal, and pay therefor $10 per acre, just as the San Diego Land and Town Company, in the case decided by this court, demanded $50 per acre at one time and $100 per acre afterward for a similar so-called "water right." The supreme court of Colorado held, as did this court in the case referred to, the demand, in addition to the annual rates for the so-called water right, illegal and void. In the course of his opinion the justice, delivering the opinion of the court, said: "Our constitution dedicates all unappropriated water in the natural streams of the State 'to the use of the people,' the ownership thereof being vested in 'the public.' The same instrument guarantees in the strongest terms the rights of diversion and appropriation for beneficial uses. With certain qualifications it recognizes and protects a prior right of user, acquired through priority of appropriation. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator; but to constitute a legal appropriation the water diverted must be applied within a reasonable time to some beneficial use—that is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer, though

the priority of such appropriation may date, proper diligence having been used, from the commencement of the canal or ditch. The constitution unquestionably contemplates and sanctions the business of transporting water for hire from natural streams to distant consumers. The Colorado doctrines of ownership and appropriation (as declared in the constitution, statutes, and decisions) necessarily give the carrier of water an exceptional status; a status differing in some particulars from that of the ordinary common carrier. Certain peculiar rights are acquired in connection with the water diverted. It is unnecessary now, however, to enumerate these rights in detail. For the present, it suffices to say that they are dependent for their birth and continued existence upon the use made by the consumer. But, giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a "proprietor" of the water diverted. A cursory reading of the statutes might convey the impression that the legislature regarded the carrier as possessing a salable interest in this water; and the constitutional phrase, "to be charged for the use of water," relating to the carrier's compensation, might at first glance seem to recognize a like ownership in such use; but, construing all the provisions of that instrument bearing upon the subject *in pari materia*, the correctness of both of these inferences must be denied. The constitutional convention was legislating with reference to the necessities and practical wants of the people, and this body in its wisdom ordained that the ownership of water should remain in the public, with a perpetual right to its use, free of charge, in the people. By section 8, article XVI, of the constitution, from which the foregoing phrase is taken, the convention recognized the carrier's right to compensation for transporting water, and provided for a judicial or quasi-judicial tribunal to fix an equitable maximum charge where the parties fail to agree. It requires no citation of authority to show that the words "pur-

chase" and "sale," together with other words of like import used in this connection by the legislature, must receive a corresponding interpretation. Under the constitution, as I understand it, the carrier is at least a quasi-public servant or agent. It is not in the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others, being engaged in the business of transporting, for hire, water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned and its profits or emoluments are fairly guaranteed; but in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control. Were the constitution and statutes absolutely silent as to the amount of the charge for transportation and the time and manner of its collection, there would be a strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the line of its canal. Its vocation, together with the use of its property, are closely allied to the public interest. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions term "a public duty or trust."

In the subsequent case of Holmes *vs.* Agricultural Ditch Co. (28 Pac. Rep., 966) the supreme court of Colorado held that the constitutional right of individual consumers, upon tender of the regular rates, to water diverted by a carrier cannot be evaded or qualified by a regulation compelling the purchase of stock in the carrier company as a condition precedent to its use, saying: "If ditch companies were at

liberty to divert water without limit and at the same time make the ownership of stock an absolute condition precedent to the right to procure water from their irrigating canals, water rights would soon become a matter of speculation and monopoly, and tillers of the soil would have to pay exorbitant rates for the use of water, or our arid lands would become unproductive. The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation. This is evident from the fact that provision is made for establishing reasonable rates to be charged for the use of water by individuals or corporations furnishing the same, the evident purpose of which is that actual and beneficial consumers of water may not be subjected to extortionate demands."

In line with what has been said above are the cases in the supreme court of California of Price *vs.* Riverside L. & I. Co. (56 Cal., 431) and People *vs.* Stephens (62 Cal., 209). In Price *vs.* Riverside Co. it was, among other things, claimed that the company was a purely private corporation, and not obliged to furnish water to the public. The court said: "So far as the appropriation, purchase, or condemnation as to a public use of waters for irrigation purposes, as also their distribution for rates or tolls is concerned, defendant cannot deny that it is a 'canal' company. Each person entitled to water, on the theory that such companies are charged with the duty of disposing of it for proper compensation, is entitled to treat with defendant as if it had been organized exclusively under the act of May 14, 1862, 'An act to authorize the incorporation of canal companies and the construction of canals' (Stats. 1862, p. 540). The rights and privileges which may be claimed and exercised by defendant with respect to water are derived from that act. With reference to such rights and privileges, and their corresponding obligations, the defendant is at least a corpora-

tion *de facto*; it cannot successfully assert the one and disregard the other. Every corporation deriving its being from the act above cited has impressed upon it a public trust—the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created. Every such corporation may exercise, on behalf of the public, the power of eminent domain, and no man nor company of men, incorporated or otherwise, can take the property of a citizen for his own or their own exclusive benefit. So plain a proposition cannot require elaboration. The power—in its nature a public power—and the public duty are correlative. The duty exists without any express statutory words imposing it wherever the public use appears. Nor is it necessary, as the case is presented, to deny that a corporation may be formed to furnish with water, for purposes of irrigation, a particular community, or even a particular territory, provided the territory is not in the exclusive occupation of the corporation itself. This defendant was organized 'to furnish, sell, give, or supply water to any person or corporation, for irrigation, mechanical, or other purposes.' Even assuming that the duty imposed on defendant by its articles of incorporation and the law under which it was created could be limited by a transfer to it from the Southern California Colony Association of its 'rights, franchises, and privileges,' the last-named corporation was organized to furnish, etc., water to people of the town and colony mentioned in the complaint 'and others' in the townships specifically set forth, for irrigation and other purposes. The plaintiff's land is a portion of one of the townships named in the complaint and the articles of incorporation of the Southern California Colony Association. The defendant, therefore, is bound to furnish plaintiff with water to irrigate his lands on his payment of the rates fixed in the manner prescribed by law—it having the water to furnish. The case shows that defendant has an ample

supply of water to furnish the quantity demanded by those entitled to receive it, including the quantity alleged on argument to be needed by plaintiff. The rates which defendant may charge have never been fixed in the manner required by law, but defendant has itself fixed the rates and could not be permitted to refuse water to one otherwise entitled to receive it who should offer to pay those rates."

In People *vs.* Stephens, in speaking of sections 1 and 2 of article XIV of the constitution of California, the court said: "By section 1 of article XIV, the use of all water heretofore or hereafter appropriated for sale, rental, or distribution, is expressly declared to be a public use. It is not left to the legislature, as formerly, to say whether it shall be a public use or not, but the constitution itself declares it to be such, and then makes the use subject to the regulation and control of the State—that is to say, of the legislature—in the manner to be prescribed by law, to wit, by statute law, subject, however, to certain enumerated provisions contained in the constitution itself, among them to provisions in respect to the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county or city or town, or the inhabitants thereof. Such rates or compensation the constitution expressly declares shall be fixed in a certain specified manner, at a certain time, and by a certain body, and the body failing to do so is expressly made subject to peremptory process to compel action at the suit of any party interested, and liable to such further processes and penalties as the legislature may prescribe; but by the next section of the same article of the constitution the right to collect the rates or compensation so established is declared to be a franchise, 'and cannot be exercised except by authority and in the manner prescribed by law'—that is, by statute law; but of course the constitution contemplated the enacting by the legislature, where they did not exist, of all laws necessary to give effect to its demands, and that none should be passed

in contravention to its provisions. When, therefore, the constitution fixed the manner of establishing the rates or compensation to be charged for water furnished to any city and county or city or town, or the inhabitants thereof, and further declared that the right to collect the rates or compensation so established is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law, it was the duty of the legislature, if they did not exist, to provide the needful laws."

It is impossible to reconcile the declarations of the supreme court of California in either of the two cases last referred to, or in any other case to which my attention has been called, with a right on the part of any corporation appropriating water under and by virtue of the constitution and laws of California for sale, rental, or distribution, to exact any sum of money or other thing, in addition to the legally established rates, as a condition upon which it will furnish to consumers water so appropriated. In the very late case of Merrill *vs.* South Side Irrigation Company (44 Pac. Rep., 720), the supreme court of California held that the provisions of section 1 of article XIV of the constitution of that State applies to all water designed, set apart, and devoted to purpose of sale, rental, or distribution, without reference to the mode of its acquisition; and, accordingly, it held in that case that water acquired by the irrigation company from the city of Los Angeles was subject to the constitutional provisions referred to, and that the company, having supplied it for irrigation to the plaintiff in that case, was by virtue of the second clause of section 552 of the Civil Code of California legally bound to continue such supply at the rates it had established, the company having on hand a sufficient supply for the purpose.

Of course, no company can be compelled to furnish water beyond its capacity. Indeed, consumers themselves are vitally interested in seeing that the capacity of the distributor is not overtaxed; so much so that in Colorado it is held,

and properly held, that a consumer who settles upon and improves land by means of water appropriated and distributed under and by virtue of the constitution and laws of that State, giving to the first in time the first in right, can maintain a suit against the distributor of such water to prevent the spreading of it beyond the capacity of the system so as to endanger the supply of those whose rights have already vested and upon the faith of which they have invested their money and made their improvements (Wyatt *vs.* L. & W. Irrigation Co., 33 Pac. Rep., 144).

In California the same right is secured to the consumer by statute as well as by judicial decision. It has already been seen from the reference made to the case of Price *vs.* Riverside L. & I. Co. (56 Cal., 431), and Merrill *vs.* South Side Irrigation Company (44 Pac. Rep., 720), that the right of the consumer to demand of the corporation a supply of water presupposes a sufficient supply for the purpose under the control of the company; and by the provisions of section 552 of the Civil Code of California a consumer whose rights have once vested is protected from the injury of having his supply of water cut off, for it in terms declares him entitled to the continued use of the water upon the payment of the rates established as required by law. Necessarily growing out of this right to the continued use of the water which he has acquired as a perpetual easement to his land is the right of such consumer to prevent, by injunction, if need be, the distributor from disposing of or attempting to furnish others beyond the capacity of the system, thereby imperiling the rights of those already vested. So long, however, as a sufficient supply exists, every person within the flow of the system has the legal right to the use of a reasonable amount of water in a reasonable manner upon paying the rate fixed for supplying it. In California, as has been seen, the constitution itself provides that the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city, town, or

other municipality shall be fixed in the month of February of each year by the governing body of such a city, town, or other municipality, "by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer."

The rates to be charged for water appropriated under and by virtue of the constitution and laws of the State to persons outside of cities, towns, and other municipalities were by the constitution left to be provided for by the legislature, and this the legislature of California did by an act approved March 12, 1885 (Stats. 1885, p. 95), entitled "An act to regulate and control the sale, rental, and distribution of appropriated water in the State other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use."

By the terms of this act of the legislature the boards of supervisors of the several counties are given power and it is made their duty, in the manner prescribed in the act, to fix the maximum rates at which any person, company, or corporation may sell, rent, or distribute water appropriated for the purpose. The circumstances and conditions under which such board is authorized and required to do that thing are prescribed by sections 3, 4, 5, and 6 of the act. The action of the board can only be invoked in the first instance by a petition in writing of not less than twenty-five of the inhabitants who are tax-payers of the county. It may be that the number thus fixed by the statute is too large; that in some cases it may be difficult, in others impossible, to obtain twenty-five inhabitants who are tax-payers of the county to join in the petition asking the board to establish maximum rates. If so, it is a matter for the consideration of the legislature, with which the constitution has left it. By the statute as enacted, when such a petition, so signed, has been presented the board, upon giving the notice required, is empowered to examine witnesses, to send for

persons, books, and accounts, to ascertain the value of the water system and the reasonable expenses of its management and operation, including the cost of repairs, together with all other facts, circumstances, and conditions pertinent to the question, and after such investigation and consideration to fix and establish the maximum rates at which the water shall be sold, rented, or distributed to the inhabitants of the county outside of any city, town, or other municipality, the board being empowered to establish different rates for water furnished for the different uses, such as mining, irrigation, mechanical, manufacturing, and domestic, but being required to make them equal and uniform as to each class, and being further required to "so adjust them that the net annual receipts and profits thereof to the said persons, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than 18 per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water, of each of such persons, companies, associations, and corporations: but in estimating such net receipts and profits, the costs of any extensions, enlargement, or other permanent improvements of such water rights or water works shall not be included as part of the said expenses of management, repair, and operating of such works, but when accomplished may and shall be included in the present cost and cash value of such work."

By section 6 of the act, it is provided that at any time after the rates have been once established by the board of supervisors the same may be established anew or abrogated in whole or in part by such board, to take effect one year next after such first establishment, upon either the written petition of twenty-five of the inhabitants who are tax-payers of the county, or "upon the written petition of any persons, companies, associations, or corporations, the rates and compensations of whose appropriated waters have already been

fixed and regulated and are still subject to such regulation by any of the boards of supervisors of this State, as in this act provided."

Not until after the rates have been once established upon the petition of twenty-five of the inhabitants who are taxpayers of the county is the person, company, or corporation furnishing the water authorized to make any application to the board; then and then only such person, company, or corporation may apply to have the rates established anew or abrogated in whole or in part.

Since to make good the appropriation it is essential that the water be applied to some beneficial use, these provisions of the statute of themselves necessarily presuppose that, until the action of the board of supervisors is called into play, the parties furnishing the water must designate the rates. It cannot be furnished for nothing. The law does not exact that nor has any consumer the right to expect it. The statute evidently proceeds upon the theory that the rates charged by the person, company, or corporation may be satisfactory to the consumers; in which event there would be no occasion for the intervention of the board of supervisors; but, to protect the consumers in the event such charges should be unsatisfactory, they and they only are given the right to first invoke the intervention and action of the board. Until that time the rates established and collected by the person, company, or corporation furnishing the water prevail. This, it seems to me, would be the true and obvious construction of the statute if it had not so declared in terms; but the statute itself does so declare in terms and in these words: "Until such rates shall be so established (namely, those first established by the board) or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriate water for such rental or dis-

tribution to the inhabitants of any of the counties of this State shall be deemed and accepted as the legal rates thereof" (Act Cal. of 1885, § 5).

Should the rates fixed by the board designated by the law for the purpose be so unreasonable as to justify the interposition of a court, any party aggrieved would have his remedy in the appropriate court by which such unreasonable rates would be annulled and the question again remitted to the body designated by the law to establish them. But in no case would the court undertake to do so (Reagan *vs.* Farmers' Loan and Trust Company, 154 U. S., 420; Chicago and Grand Trunk Railway Company *vs.* Wellman, 143 U. S., 339; Santa Ana Water Company *vs.* Town of San Buenaventura, 65 Fed. Rep., 323). Therefore, it is not for the court in the present case to go into the question of the reasonableness of the rates established by the complainant and which it seeks to enforce. If unreasonable and the consumers are for that reason dissatisfied therewith resort must first be had to the body designated by the law to fix proper rates, to wit, the board of supervisors of San Diego county.

The suggestion urged by the defendants that the board of supervisors cannot be trusted, but will be controlled by the water company, even if based on fact, is no argument whatever against the existence and validity of the law. But it cannot be true, unless the people themselves, having the selection of such officers, deliberately choose to put in such positions of honor and trust unworthy and debased men.

The views above expressed are conclusive against the positions of the defendants, unless it be, as claimed by them, that the complainant is estopped from making any changes in the rates at which it has heretofore furnished the defendants with water, or that the water in question is so far private property as that the parties to the suit could make valid contracts in respect to the rates at which the company should furnish it to the defendants. If the company is a

private corporation and the water private property, this would undoubtedly be so; but if the complainant is a public or quasi-public corporation, and the water in question is and at all times mentioned has been charged with a public use, it is not true, for nothing can be clearer than that in respect to such water rates established in pursuance of law must control, and that no attempt to ignore that control and to establish them by private contract is of any validity.

The fact that some of the purposes for which the complainant company was incorporated are purely private is unimportant, since among the purposes is "the supplying of water to the public," and "the construction and maintenance of dams and canals for the purpose of water works, irrigation, or manufacturing." As said by the supreme court of California in Price *vs.* Riverside L. & I. Co., *supra*, the complainant company cannot escape the performance of the duty of furnishing the public with water by asserting that it was also incorporated for some private purpose or purposes. Both the bill and answer assert the public character of the complainant, as well as the fact that the water in question was appropriated by the complainant under and by virtue of the constitution and laws of California for sale, rental, and distribution to the public. In the bill it is alleged "that the said company is, and has been during said time, the owner of valuable water, water rights, reservoirs, and the entire water system, for furnishing water to consumers for domestic, irrigation, and other purposes, for which water is needed for consumption, and of a franchise for the impounding, sale, disposition, and distribution of the waters owned and stored by it to the defendants and other consumers and to the city of National City and its inhabitants." And, again, "that by the expenditure of said large sum said company has procured and owns, subject to the public use and the regulation thereof by law, water, water rights, a reservoir site and

reservoirs * * * and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands hereinafter mentioned and the city of National City, and its inhabitants, with water, and has constructed and put in mains, pipes, and all other things necessary to connect said water supply with the premises and buildings of the defendants and each of them, and to all the buildings and premises of said city and its inhabitants, and to furnish them, and each of them, with water, and was, at the times hereinafter mentioned, furnishing them and each of them with water."

The defendants, in their answer, "deny that said corporation is or at any time was the owner of the water or water rights as alleged in the complaint, otherwise than as the appropriator under the constitution and statutes of the State of California, and the acts of Congress, of the water of the natural stream in the said county of San Diego known as the Sweetwater river. And they aver that the purposes of such appropriation were for sale, rental, and distribution to the public."

In view of these statements in the pleadings of the parties themselves, it is too plain for discussion that the water in question is charged with the public use declared by the constitution and laws of California. Under such circumstances the case of McFadden *vs.* Board of Supervisors of Los Angeles County (74 Cal., 571), relied upon by the defendants, has no application whatever.

Nor is the case one, in my opinion, for the operation of any doctrine of estoppel. Indeed, one of the counsel for the defendants says in his brief: "It is not our claim that the company is estopped to change the rate by reason of the fact that it has established and collected a lower rate, but we claim that, in so far as the company is engaged in furnishing water for a public use, it has no right to make rates at all, either in the first instance or by way of changing them after they have once been adopted; that in so far

as the use is private, when the right arises out of a contract or deed, the rate fixed by the contract controls, and the rights vested by the deed at the time it is made cannot be changed by one party to it. Neither do we claim that by any contract between the parties with reference to the rates to be charged for the use of water where it is being distributed to the public, the power of regulation which the constitution declares should belong to the State can be taken away. What we say is that as to those rates which are vested, as it were, as private rights, the company has no legal right to establish another rate than that agreed upon; that in so far as the rate is to a public use, the statute has said that that which has been fixed and established by the mutual consent of the parties or by their action, which amounts to consent, those rates shall not displace the power of the government to regulate, but shall themselves be the rates until the sovereign power of regulation is exercised."

As the water in question, from the moment the appropriation became effective, became charged with a public use, it was not in the power of either the corporation making the appropriation or of the consumers to make any contract or representation that would at all take away or abridge the power of the State to fix and regulate the rates. All persons are presumed to know the law, and those who bought lands from the complainant corporation upon its representations that water for irrigation would be furnished at the annual rate of $3.50 an acre, or otherwise acted or contracted with reference to such rates, must be held to have known that the constitution conferred upon the legislature the power and made it its duty to prescribe the manner in which such rates should be established. This the legislature has done by the act of March 12, 1885. As by that act the legislature deemed it proper to allow the action of the board of supervisors to be invoked in the first instance only by twenty-five inhabitants, who are tax-payers of the county, and until then to leave the designation of rates to

the person, company, or corporation furnishing the water, to hold valid and binding any contract between parties with reference thereto would be in effect to ignore and set aside the provisions of the statute upon the subject, for it is plain that a contract must bind all of the parties to it, or it binds none; and, if binding at all, its manifest effect would be to remove from the regulation of the State the rates in question, and leave them to be governed and controlled by private contract, or such representations and acts as may amount to the same thing. No company or corporation charged with a public use can be estopped by any act or representation from performing the duties enjoined on it by law. It will hardly be contended that the defendants, by reason of any of the express contracts pleaded in defense of the suit or of any contract growing out of the representations alleged to have been made by the company, would be estopped from applying to the board of supervisors of the county for the establishment of rates. The case, in truth, affords no basis for the operation of an estoppel against either party, which, to be good, must be mutual (Litchfield *vs.* Goodnow, 123 U. S., 549).

The complainant, being in charge of a public use, in the management of it, does not act for the defendants alone, but, to the extent of the capacity of the system to furnish water, for all of the public who are or may be situated within its reach, all of whom similarly situated and for like purposes are entitled to similar rates.

Exceptions sustained.